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142-128

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. ~~152~~ 113

C. H. VAN STONE, PLAINTIFF IN ERROR,

vs.

THE STILLWELL AND BIERCE MANUFACTURING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

FILED SEPTEMBER 22, 1888.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 452.

C. H. VAN STONE, PLAINTIFF IN ERROR,

vs.

THE STILLWELL AND BIERCE MANUFACTURING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

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a UNITED STATES OF AMERICA, *sct:*

The President of the United States to the judges of the circuit court of the United States for the western division of the western district of Missouri, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The Stillwell and Bierce Manufacturing Company (a corporation), plaintiff, and C. H. Van Stone, defendant, a manifest error hath happened, to the great damage of the said C. H. Van Stone, defendant, as by his complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, D. C., on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the United States Circuit Court for the Western District of Missouri, Western Division.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court.

Issued at office, in Kansas City, this sixth day of February, A. D. 1888.

WARREN WATSON, *Clerk*,
By —— ——, *D. C.*

Allowed by—
(Signed) A. KREKEL, *Judge.*

b [Endorsed:] (1.) United States circuit court, western district of Missouri, western division. Stillwell & Bierce M'f'g Co. *vs.* C. H. Van Stone. Writ of error. Filed ——, 18—. ——, clerk.

WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI, *sct:*

I do hereby return due and perfect obedience to the within writ, and do herewith, under the seal of said circuit court, distinctly and openly, send the record and proceedings aforesaid, with all things concerning the same.

Witness my hand as clerk and the seal of said court.

Issued at office, in Kansas City, this ninth day of June, A. D. 1888.

WARREN WATSON, *Clerk*,
By —— ——, *Deputy Clerk.*

c UNITED STATES OF AMERICA, *sct:*

To The Stillwell & Bierce Manufacturing Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western division of the western district of Missouri, wherein C. H. Van Stone is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Arnold Krekel, judge of the circuit court of the United States for the western division of the western district of Missouri, this 6th day of February, in the year of our Lord one thousand eight hundred and eighty-eight.

(Signed) A. KREKEL, *Judge.*

d [Endorsed:] (2.) United States circuit court, western district of Missouri, western division. Stillwell & Bierce M'f'g Co. *vs.* C. H. Van Stone. Citation. Filed —— —, 188–. ——, clerk.

UNITED STATES OF AMERICA, *Western District of Missouri,* } *ss:*

We hereby acknowledge due service of the within citation this twentieth (20th) day of February, A. D. 1888.

DAVIS & WINGFIELD,
Attorney- for Defendant in Error.

1 UNITED STATES OF AMERICA, *sct:*

Pleas and proceedings had before the circuit court of the United States for the western division of the western district of Missouri in a cause wherein The Stillwell & Bierce Manufacturing Company is plaintiff and Charles H. Van Stone is defendant, at law.

Be it remembered that heretofore, to wit, on the 28th day of April, A. D. 1886, in vacation of said court, the following entry appears of record in said cause:

STILLWELL & BIERCE M'F'G CO. *against* C. H. VAN STONE. } 1128.

This day there is received and filed a transcript of record in the above-entitled cause from the circuit court of Saline county, Mo., said cause having been removed from said court by the plaintiff under the provisions of section 639 of the Revised Statutes of the United States.

Said transcript is in words and figures as follows, to wit:

STATE OF MISSOURI, } ss:
County of Saline, }

Pleas before the circuit court of Saline county at the February term, A. D. 1886, before the Hon. John P. Strother, judge of the sixth judicial circuit of Missouri, in the cause wherein Stillwell & Bierce Manufacturing Company is plaintiff and Charles H. Van Stone is defendant.

Be it remembered that on the 20th day of January, A. D. 1886, the following proceedings were had, to wit:

2 There was filed in the office of the clerk of the circuit court a petition in this cause; which said petition is in words and figures following, to wit:

STATE OF MISSOURI, } ss:
County of Saline, }

Fred. J. Shupp, being sworn, states that about the month of January, 1885, he entered into a contract with Charles H. Van Stone to furnish certain machinery and other material and to perform certain labor in fitting up the mill of said Charles H. Van Stone, and in placing said machinery and materials in said mill; which said mill is situated on lots two (2) and three (3) of block one (1), Alexander's and Sandidge's Addition to the city of Marshall, Saline Co., Mo., for which said Van Stone agreed to pay the sum of eighty-two hundred dollars; that said Shupp has complied with his part of said contract in every respect, and in addition thereto has performed certain extra work and labor and furnished certain extra material and machinery at the special instance and request of the said Charles H. Van Stone; that the above and foregoing account is a just and true account of the amount due said Fred. J. Shupp from said Charles H. Van Stone for mechinery and other material placed in said mill by said Shupp, and for work and labor performed by said Shupp in placing said material and machinery in said mill pursuant to the terms of said contract, after all just credits have been given, and is also a just and true account of the extra machinery and materials furnished and placed in said mill by said Shupp, and of the work and labor performed by said Shupp in placing said machinery and material in said mill, and said account is a just

3 and true account of the demand due said Shupp after all just credits have been given, and is intended to be a lien upon said mill and the lots upon which the same is situated, said lots being lots two (2) and three (3), block (1), Alexander and Sandige's Addition to the city of Marshall, Mo., and said mill being described as follows, to wit:

One three-story mill, with basement with elevator-room attached, said mill being 40 ft. x 60 ft. in size and about 45 feet in height above basement, the elevator-room being on north side 16 ft. x 60 ft. and about 40 ft. high; also an engine and fuel-room attached on the east side, being about 56 ft. x 40 ft. and about 18 ft. high; that

the owner of said lot and said mill is Charles H. Van Stone, and said Fred. J. Shupp is the original contractor for the furnishing and placing of said machinery and material in said mill, and said balance due for which this lien is sought is $5,392.53, and that this lien is filed within six months after this indebtedness has accrued, this December 21, 1885.

FRED. J. SHUPP.

Subscribed and sworn to before me this December 21st, 1885.

G. W. LANKFORD, *Clerk*,
By ED. T. OREAR, *D. C.*

In the Circuit Court of Saline County, Mo. February Term, 1886.

STILLWELL & BIERCE M'F'G Co., Incorporated, Plaintiff,
against
CHARLES H. VAN STONE, Defendant.

Plaintiff states that it is a corporation duly incorporated under the laws of the State of Ohio, and as such entitled to contract and be contracted with and to sue and be sued; that on the 16th
4 day of January, 1885, one Fred. J. Shupp entered into a contract with the defendant, by which said Shupp agreed to build*ing* the elevator building of defendant, situated in the north part of the city of Marshall, Saline county, Mo., said elevator building being situated on lots two (2) and three (3), block one (1), of Alexander & Sandidge's Addition to said city of Marshall, a flouring mill for the manufacture of flour, meal, and bread-stuffs, and in constructing said mill said Shupp agreed to furnish all the material except such as was then on said premises, and to do all the work and be at all of the expense, the material and articles to be used in the construction of said mill being set forth in a paper attached to said contract and made a part thereof by the parties thereto, said material to be good and durable and the workmanship to be first class. It was also agreed that said Shupp should make all necessary connections between the engine and other machinery, and that said mill should be complete and ready for delivery before the first day of August, 1885. It was further agreed that the capacity of said mill should be from fifty to seventy-five barrels of flour and from three hundred to four hundred bushels of corn per day of twenty-four hours, and the work of said mill as to the quality of flour and meal manufactured should be first class and the quantity of flour and meal produced by said mill in proportion to the wheat and corn used should be up to the standard of first-class mills, and particularly the Aulville mill, of Aulville, Mo., as to quality and quantity of flour and meal produced in proportion to grain used. It was further agreed that when said Shupp was ready to deliver said mill to the defendant upon its completion he should notify the defend-
5 ant of such fact, and one Frank Summerville should be requested to go to said mill and test the same; said Shupp, at his own expense, to put said mill in operation, the defendant to fur-

nish fuel and grain, and said Summerville should decide whether or not said mill was constructed and operated in accordance with the terms of said contract, and if said Summerville decided that said mill operated and was constructed in the manner required by said contract, then said mill should be delivered to the defendant, but if said Summerville decided that said mill was not built or did not operate according to said contract he should, if in his power, inform said Shupp of what the deficiency consisted, and said Shupp should have fifteen days in which to correct such deficiency, and at the end of said time the said Summerville should again examine and test said mill as before, and if he decided that the same complied with said contract it should be delivered to the defendant, but if he decided that said mill did not comply with said contract he should make an estimate and ascertain what amount ought to be deducted from the contract price for said mill on account of its failure to comply with said contract, and said mill should be delivered to the defendant and the decision made by said Summerville should be final upon the parties to said contract. In consideration of the compliance by said Shupp with his part of said contract defendant agreed to pay said Shupp the sum of eight thousand two hundred dollars, as follows:

On the first day of April, 1885, five hundred dollars, and on the first day of May, 1885, five hundred dollars, and when said mill is delivered to him the sum of twelve hundred dollars, and at the time of such delivery the said Van Stone was to execute to said
6 Shupp his three promissory notes, each for the sum of two thousand dollars, one to mature one year after date, one in two years after date, and the third in three years after date, all bearing interest from date at the rate of seven per cent. per annum, the interest to be paid annually, said notes to be well secured on real estate, and the sufficiency of the security to be determined by Will. H. Wood, Esq., of Marshall, Mo., or, in case he fail to act, by J. H. Cordell, of Marshall, Mo. Plaintiff states that after entering into said contract said Shupp fully complied with the same and built said mill and furnished the machinery therefor as in said contract required, except that said Shupp did not complete said work within the time required by said contract, in this: that that part of the machinery intended for the grinding of corn did not work to the satisfaction of said Van Stone at the time when said contract should have been completed, but that the said Van Stone, by an instrument in writing, herewith filed and marked Exhibit A, waived his rights to demand a full compliance with said contract as to time and agreed that whenever the part of said mill intended for grinding corn was so completed as to do satisfactory work that he would pay for the entire work, and said Van Stone, by said writing, accepted all that part of said work which was intended for making flour; that afterwards said Shupp completed said mill and fully complied with said contract and said Frank Summerville examined and tested the same as provided by said contract and accepted the same on the 16th day of October, 1885, and the defendant then and there promised and agreed to pay for said mill in accordance with the terms of said

contract, and thereupon said mill was turned over to said Van Stone and was received and accepted by him, said defendant then and there waiving all objections on account of said mill not being completed within the time required by said contract; that defendant has paid said Shupp on said contract the following sums, to wit:

7	January 26,	1885	$450	
	May 7,	"	550	
May 26,		"	813	75
Aug. 6,		"	1,200	
" 6,		"	30	37
			$3,044	12

That during the time that said Shupp was engaged in said work as aforesaid he performed extra work and labor on said mill and furnished and placed in said mill extra material and machinery not embraced in said contract at the special instance and request of the defendant, for which the defendant agreed and promised to pay said Shupp what said extra labor, material, and machinery were reasonably worth; that the extra work, material, and machinery so furnished by said Shupp is reasonably worth the sum of two hundred and thirty-six dollars and sixty-five cents, as appears by an itemized account thereof filed herewith in connection with a full account of all the work and labor performed and material and machinery furnished by said Shupp, both under the original contract above set forth and said contract for the furnishing of such extra work and labor and machinery and material, and plaintiff states that, after deducting the credits aforesaid, there remains due said Shupp on said original contract and for the furnishing such extra work and machinery the sum — five thousand three hundred and ninety-two dollars and fifty-three cents ($5,392.53).

Plaintiff further states that, although said Shupp complied with the terms of said contract as aforesaid and furnished such extra work and machinery as aforesaid, the defendant, with the exception of paying the amounts credited above, has failed to comply with his part of said contract by paying the amount and execut-
8 ing the notes as above set forth and specified in said contract, and wholly failed and refused to pay for said extra work, material, and machinery furnished by said Shupp as aforesaid. Plaintiff further states that said Shupp was the original contractor with the defendant, both for the performance of said contract and for the furnishing of the extra work, material, and machinery aforesaid, and was entitled to a lien upon said mill building and the lots upon which the same is situated for all the work and labor performed and all the material and machinery furnished, both under said original contract and said contract for furnishing such extra work, material, and machinery, and that for the purpose of securing said lien as aforesaid by law the said Shupp, as original contractor, did, on the 21st day of December, 1885, and within six months after the completion of said mill as aforesaid, and after the last item of work, material, and machinery was furnished as afore-

said, file with the clerk of the circuit court of Saline county, Mo., a just and true account of the demand due him after all just credits had been given and a true description of the property, or so near as to identify the same, upon which the lien was intended to apply, with the name of the owner of said property, to wit, the defendant, Charles H. Van Stone, and of the contractor, to wit, said Fred. J. Shupp, describing the real estate upon which said mill is situated as lots 2 and 3, in block one (1), Alexander & Sandidge's Addition to the city of Marshall, Saline county, Mo., and described said mill as one three-story mill with basement and elevator-room attached, said mill being 40 ft. x 60 ft. in size and about 45 feet in height above basement, the elevator-room being on north side 16 feet x 60 feet and about 40 feet high; also an engine and fuel room attached on the east side, being about 56 feet x 40 feet and about 18 feet high;
9 that the defendant was then and now is the owner of said property and said Fred. J. Shupp was the original contractor for the performance of said contract and furnishing such extra work, material, and machinery, and the said account and statement filed with the circuit clerk as aforesaid was verified by the oath of said Fred. J. Shupp, as required by law; that an itemized account of all the work and labor performed and of all the material and machinery furnished and placed in the mill of the defendant aforesaid by said Shupp, together with the credits to which defendant is entitled, is herewith filed and marked Exhibit "B," and that by reason of the premises said Shupp became and was entitled to a mechanic's lien on the real estate aforesaid and on the buildings and improvements situated thereon to the extent of his demand against the defendant as aforesaid, to wit, the sum of $5,392.53; that afterwards, to wit, on said 21st day of December, 1885, the said Shupp, for value received, assigned, transferred, and set over to plaintiff all his accounts against defendant for work and labor, machinery and material, furnished as aforesaid, and also his mechanic's lien on said property so filed as aforesaid, and by said assignment, which was in writing, signed by said Shupp, authorized said plaintiff to enforce said lien and to collect said account according to law. Plaintiff therefore states that by reason of the premises it is entitled to recover from the defendant said sum of $5,392.53, with interest thereon from the 16th day of October, 1885, the time when said money became due, that being the time when payment of the same was demanded by said Shupp, and that plaintiff is also entitled to a mechanic's lien on the property above described. Wherefore
10 plaintiff prays judgment against the defendant for said sum of $5,392.53, with interest and costs, and asks that the same be declared a lien upon the property aforesaid, as provided by law.

Plaintiff, for another account and statement of his cause of action against the defendant, states that on the 16th day of January, 1885, one Fred. J. Shupp agreed with the defendant to perform certain work and labor and to furnish certain material and machinery and fit up for defendant a certain flouring and grist mill in the city of Marshall, Saline county, Mo., for the manufacture of flour, meal, and bread-stuffs, for which defendant agreed to pay said Shupp

what said work and labor and materials and machinery were reasonably worth, and that in pursuance of said agreement said Shupp did perform work and labor and furnished materials and machinery in the fitting up of said mill between said 16th day of January, 1885, and the 16th day of October, 1885; an itemized account of all said work and labor performed and material and machinery furnished, together with the credits due thereon, is herewith filed and marked Exhibit B and referred to in the first count of this petition; that the work and labor performed and materials and machinery furnished by said Zhupp *was* reasonably worth the sum of eight thousand four hundred and thirty-six and $\frac{65}{100}$ dollars, of which amount defendant has paid said Shupp the sum of $3,044.12 on the dates set forth in said account, leaving due said Shupp a balance of $5,392.53; that said work and labor was performed and materials and machinery furnished as aforesaid in the fitting up of a mill owned by the defendant, situated on lots two (2) and three (3), block one (1), Alexander & Sandidge's Addition to the city of Marshall, Saline
11 county, Mo., and that by reason of the premises said Shupp became and was entitled to a mechanic's lien on said mill and on the lots on which the same is situated, as above described, to the extent of this demand as aforesaid, to wit, the sum of $5,392.53, and that for the purpose of securing said lien, as provided by law, the said Shupp, as original contractor, did, on the 21st day of December, 1885, and within six months after the completion of said mill as aforesaid, file with the clerk of the circuit court of Saline county, Mo., a just and true account of the demand due him after all just credits had been given, and a true description of the property, or so near as to identify the same, upon which the lien was intended to apply, with the name of the owner of said property, to wit, the defendant, Charles H. Van Stone, and of the contractor, to wit, said Fred. J. Shupp, describing the real estate upon which said mill is situated as lots 2 & 3, block 1, in Alexander & Sandidge's Addition to the city of Marshall, Saline county, Mo., and describing said mill as one three-story mill with basement and elevator-room attached, said mill being 40 feet x 60 feet in size and about 45 feet in height above basement, the elevator-room being on the north side 16 feet x 60 feet and about 40 feet high; also an engine and fuel room attached on the east side, being about 56 feet x 40 feet and about 18 feet high; that the defendant was then and is now the owner of said property and said Fred. J. Shupp was the original contractor for the performance of said work and labor and the furnishing of said materials and machinery, and the said account and statement filed with the circuit clerk as aforesaid was verified by the oath of said Fred. J. Shupp, as required by law, and that by reason of the premises said Shupp became and was entitled to a mechanic's lien on
12 the real estate aforesaid and on the buildings and improvements situated thereon to the extent of his demand against the defendant as aforesaid, to wit, the sum of $5,392.53; that afterwards, to wit, on said 21st day of December, 1885, said Shupp, for value received, assigned, transferred, and set over to plaintiff all his accounts against the defendant for work and labor, machinery and

materials, furnished as aforesaid; also his mechanic's lien on said property, so filed as aforesaid, and by said assignment, which was in writing, signed by said Shupp, authorized plaintiff to enforce said lien and to collect said account according to law. Plaintiff therefore states that by reason of the premises it is entitled to recover from the defendant the sum of $5,392.53, with interest thereon from the 16th day of October, 1885, the time when said money became due, that being the time when said money was demanded by said Shupp, and that plaintiff is also entitled to a mechanic's lien on said property above described. Wherefore plaintiff prays judgment against the defendant for said sum of $5,392.53, with interest and costs, and asks that the same de declared a lien upon the property aforesaid, as provided by law.

DAVIS & WINGFIELD,
Att'ys for Pl'ff.

And there was attached to said petition the following account, to wit:

Charles H. Van Stone in Ac. with Fred. J. Shupp.

1885.

May	12.	To 1.		
May	12.	3 7 x 14 style "C" roller mills	1,575 00	
May	12.	3 7 x 14 roller mills, June, $500	1,500 00	
			3,075 00	
May	12.	Less 30 & 10	1,137 25	
				1,937 75
13	May 12.	2 # 1 Richmond bran duster-, $200	400 00	
May	12.	1 # 2 Richmond smut-er	135 00	
May	12.	1 # 2 " brush machine	250 00	
			785 00	
		Less 40 & 5%	337 55	
				447 45
"	"	1 single aspirator	80 00	
		Less 25%	20 00	
				60 00
"	"	1 Eureka magnetic separator, # 0	45 00	
		Less ¼	----	
				33 75
"	"	1 flour packer, 4 tubes	----	75 00
"	"	6 pulleys, 48 x 5, 21.20	127 20	
"	"	2 " 48 x 9, 30.65	61 30	
"	"	1 " 30 x 4½	9 00	
"	"	2 " 30 x 5, 9.45	18 90	
"	"	3 " 40 x 5, 15.30	45 90	
"	"	2 " 30 x 4, 8.55	17 10	
"	"	1 " 28 x 5	8 50	

May	12.	21 pulleys, 20 x $4\frac{1}{2}$, 5.25	110 25		
"	"	1 " 20 x $6\frac{1}{2}$	6 50		
"	"	2 " 20 x $3\frac{1}{2}$, 4.90	9 40		
"	"	5 # 45 spro'k's, 12" dia., 2.90	14 50		
"	"	1 # 45 " 10" "	2 30		
"	"	1 # 33 " 10" "	2 00		
"	"	2 # 88 " 37" " 11.50	23 00		
"	"	1 # 88 " $12\frac{1}{4}$ "	3 60		
"	"	1 # 88 12" dia. idler, with boxes & shaft	10 03		
"	"	$39\frac{1}{6}$ ft. $2\frac{7}{16}$ shafting, 1.30	50 91		
"	"	$147\frac{3}{4}$ ft. $1\frac{15}{16}$ " .87	128 54		
		May 12. $10\frac{1}{6}$ ft. $1\frac{7}{16}$ shafting, .60	6 10		
14		May 12. $11\frac{1}{6}$ ft. $1\frac{11}{16}$" shafting, .70	7 81		
			662 84		2,553 95
May	12.	6 bracket boxes, $2\frac{7}{16}$, 6.25	37 50		
"	"	3 flat " $1\frac{15}{16}$, 3.25	9 75		
"	"	1 " " $1\frac{7}{16}$	2 25		
"	"	2 collars, $2\frac{7}{16}$, 0.95	1 90		
"	"	8 " $1\frac{15}{16}$, .85	6 80		
"	"	2 " $1\frac{11}{16}$, .80	1 60		
"	"	4 upright step box-, $1\frac{15}{16}$, 4.00	16 00		
"	"	1 " " $1\frac{11}{16}$	4 00		
"	"	1 pair coupling, $2\frac{7}{16}$	8 25		
"	"	1 " " $2\frac{7}{16}$ & $4\frac{7}{16}$	30 00		
"	"	3 " " $1\frac{15}{16}$, 7.00	21 00		
"	"	1 " " $1\frac{15}{16}$ & $3\frac{7}{16}$	16 00		
"	"	$136\frac{1}{2}$ ft. of 3 standard leather belt, .33	45 05		
"	"	255 ft. of $4\frac{1}{2}$ standard leather belt, .51	130 05		
"	"	26 ft. of 4 standard leather belt, .45	11 70		
"	"	$35\frac{2}{3}$ ft. $3\frac{1}{2}$ standard leather belt, .39	13 91		
"	"	107 ft. of 6" cotton belt, .24	25 68		
"	"	$1,823\frac{1}{4}$ ft. 4" " " .16	291 72		
"	"	80 elevator cups, $5\frac{1}{2}$ x 4, .16	12 80		
"	"	1,370 elevator cups, $3\frac{1}{2}$ x 3, .09	123 30		
"	"	2,900 bolts, .01	29 00		
			1,501 10		
		Less 40 & 10%	690 50		
					810 60
"	"	224 ft. of $4\frac{1}{2}$ short lap leather, .51	114 24		
		Less 40%	45 70		
					68 54
15		May 12. $38\frac{1}{2}$ feet of 8" 4-ply rubber belt, 84	32 34		
		Less 50%	16 17		

May	12.	8 brackets for bolt chest upright, 100 --------- 8 meters & sprockets combined ---------- ---- 8 meters, 14" milters --- 4 pi. iron bevel #104, Greenald ---- ---- --- 1 pi. iron bevel #1035, Greenald ---- ---- --- 2 pi. iron bevel #1170, Greenald ---- ---- ---	987#, .06	59 22	
		Forward ---------- ----------			3,516 48
"	"	Bro't forward ---------- ----------			3,516 48
"	"	2 spin wheels, #768, Ham & Bodly, #488, @ 7c. ----------		34 16	
"	"	3 Odell corn mills ----------		195 00	
July	2.	$26\frac{7}{12}$ yds. #14 bolting cloth, 3.80 ----		101 02	
"	"	$24\frac{7}{9}$ " #13 " " 3.50 ----		86 72	
"	"	$5\frac{19}{36}$ " #9 " " 2.50 ----		13 26	
"	"	4 yds. #8 " " 2.40 ----		9 60	
"	"	6 " #6 " " 2.20 ----		13 20	
"	"	$2\frac{2}{3}$ yds. #3 " " 1.80 ----		4 80	
"	"	$1\frac{1}{3}$ " #0 " " 1.40 ----		1 87	
"	"	$7\frac{1}{9}$ yds. Gritz gauze, 3.00 ----------		21 33	
				251 80	
		Less 35% ----------		88 13	
					163 67
		Making & furnishing $122\frac{1}{3}$, 25 ----------			30 58
16		30 sq. ft. #22 wire, .20 ----------		6 00	
		30 " #24 " .20 ----------		6 00	
		30 " #26 " .22 ----------		6 60	
		$22\frac{1}{2}$ " #18 " .16 ----------		3 60	
		$31\frac{3}{4}$ " #80 " 1.05 ----------		33 33	
				54 93	
		Less 40% ----------		21 97	
					32 96
May	12.	1 #5 heater nut ---------- ----------			125 00
		Total ---------- ----------			4,097 85

Charles H. Van Stone to Fred. J. Shupp, Dr.

To extra material furnished and labor performed.

Jan'y	13.	To $\frac{1}{2}$ fee for writing contract ----------	2 50	
March	14.	" laying 2nd floor in mill, 53 hours, @ 2.50 ---- ---------- ----------	13 25	

April	15.	To difference in pulley, 22 x 48, to the K. C. I. W., K. C.	3 25
May	18.	" freight on heater, 1000#, @ 40c.	4 00
June	18.	" 10 hours' services, change blast to elevator	2 50
"	19.	" 10 hours' services, change blast to elevator	2 50
"	20.	" 10 hours' services, change blast to elevator	2 50
"	11.	" 10 hours' services, change drive E. C. machinery, Bruce	3 00
17	June 22.	To 10 hours' services, change drive E. C. machinery, Bruce.	3 00
June	22.	To 12 ft. shafting, @ 51c. net	6 12
"	"	" 2 pulleys, $4\frac{1}{2}$" x 20", @ 3.12 net	6 24
"	"	" 2 metal boxes, $1\frac{7}{16}$, @ $1.32 net	2 64
"	"	" 3 ft. $1\frac{7}{16}$, @ 40c. p'r ft. net	1 20
"	"	" 2 set- collars, $1\frac{7}{16}$, @ 60c. net	1 20
"	"	" 2 " $1\frac{15}{16}$, @ 85c. net	1 70
"	"	" 1 pair 10" meter wheel, @ 7c. p'r #	2 45
"	"	" 3 metal boxes, $1\frac{15}{16}$, @ $1.80 net	5 40
"	"	" No. 1 belt-tightener	20 00
"	"	" 10 hours' services, self, putting in same	4 50
"	"	" Sid. Bruce, for furnishing pulleys	6 50
"	19.	" 2 pulleys, 9" x 24", @ 6.12 net	12 24
July	22.	" 10 hours' services, setting corn-sheller	2 50
July	23.	" 6 hours' services, extra wheat spout, @ 30c.	1 80
"	"	" 10 hours' services, extra wheat spout	2 50
"	"	" 1 pulley, 3 x 6, @ $1.50 net	1 50
"	"	" 18 ft. 3" standard leather belts, @ 20c. net	3 60
"	30.	" 10 hours, screening spout	2 50
"	31.	" 10 " " " and in engine-room	2 50
"	17.	" 4 grate bars, 50# each, @ 2c. p'r #.	4 00
"	"	" 4 sections gas-pipe, $1\frac{1}{4}$ x 12", @ 5c. net	2 40
Aug.	28.	" 9 ft. of 11" x 11", @ $1.00 net	9 00
			139 49

18 *Charles H. Van Stone to Fred. J. Shupp, Dr.*

Aug.	28.	To 104 ft. lumber, $3\frac{1}{2}$c. p'r —	3 64
"	"	" 3 gross screws, $1\frac{1}{2}$ X, No. 10	1 20

Aug.	29.	To 60 hours' services, Bowman, @ 30c.	18 00	
"	"	" 60 hours' services, Dunica, @ 25c.	15 00	
"	"	" 30 " " Sims, @ 22½	6 75	
Sept.	5.	" 40 " " Dunica, @ 25c.	10 00	
"	7.	" 10 " " " @ 25c.	2 50	
"	10.	" 9 " " Sims, @ 22½	2 00	
"	11.	" 6 " " " "	1 35	
"	21.	" 2 pulleys, 4" x 20", $3.70 net	7 40	
"	"	" 1 elevator head, 4" x 20	6 00	
"	"	" 10 hours' services, Sims, @ 22½	2 25	
"	"	" 10 " " Ewell, @ 25c.	2 50	
"	"	" 10 " " self, @ 45c.	4 50	
"	22.	" 9 " " " @ 45c.	4 05	
"	"	" 10 " " Sims, @ 22½	2 25	
"	"	" 10 " " Ewell, @ 25c.	2 50	
"	23.	" 3 " " Sims, @ 22½	67	
"	"	" 3 " " Ewell, @ 25c.	75	
"	26.	" 8 " " " "	2 00	
"	30.	" pulley, 3" x 10", net	1 85	
			$97 16	
Oct.	28.	" am't bro't forward from page 4	139 49	
		Total	$236 65	

Invoice material, Van Stone mill:

June	22.	Side-lace leather, 21 ft., @ 38c.	7 14	
Sept.	1.	Freight charges	245 55	
Aug.	15.	P. H. Franklin, varnish	30 00	
			282 69	

19 Invoice of machinery, Van Stone mill:

July	1st.	1 4-reel scalping chest, 4 x 26		180 00
"	"	1 2- " " " 7' 3" x 26"		150 00
"	"	1 2- " " " 4' x 26"		120 00
"	"	2 4-reel bolting chest-, 14' x 32"	1,500 00	
		Less 30 %	450 00	
				1,050 00
"	"	23 elevator heads & boots & pulleys, @ 22.50	317 50	
		Less 30 %	95 25	
"	22.	1 F. M. Williams register		222 25
"	"	" "		15 00
"	"	1 corn-cleaner		35 00
Oct.	2.	1 automatic grain-weigher		100 00
				1,872 25

May	21.	200 ft. No. 45 link belt, @ 16c.			32 00
June	6.	3 set-screws			75
June	19.	800 ft. 4½" 3-ply cot. belt, @ 18c.		144 00	
"	"	600 4" tin cups, @ 11c.		66 00	
				210 00	
		Less 40 %		84 00	
					126 00
"	"	50 ft. No. 33 link belt, @ 12c.			6 00
"	"	1 p'r plate couplings, $1\frac{7}{16}$ x $1\frac{1}{2}$		4 30	
"	"	1 shaft, $1\frac{15}{16}$ x 13' 6"		8 61	
"	"	2 pulleys, 28" x 8", @ $4.25		16 50	
"	24.	2 part boxes, $2\frac{7}{16}$, @ $4.20		8 40	
"	"	1 shaft, 4' x $\frac{7}{16}$", & coupling		12 50	
"	"	1 clutch-lever corn plate		5 00	
				55 31	
		Less 40 %		22 12	
					33 19
20 July		11. 100 ft. link belt, No. 45, @ 16c.			16 00
"		27. 41 ft. 20" 5-ply rubber belt, @ 2.85		116 03	
		Less 40 %		46 45	
					69 58
July	18.	64 ft. No. 78 link belt, @ 40c.			25 60
		Total			2,181 37

Invoice of labor, Van Stone mill:

		Self:			
Jan'y	16.	About Aug. 6th, 1,200 hours, @ 45c.		540 00	
		J. K. Shupp:			
April	4.	" Aug. 1st, 1,000 " @ 30c.		300 00	
		J. K. Bruce:			
Feb.	7.	" Aug. 1st, 1,167 " @ 30c.		350 10	
		F. A. Shupp:			
Feb.	28.	" June 16th, 862 " @ 30c.		258 60	
		R. B. Clark:			
Feb.	19.	" April 18th, 318 " @ 30c.		95 40	
		J. R. Sparks:			
March	14.	" May 2nd, 217 " @ 30c.		65 10	
		W. H. Boman:			
Feb.	28.	" June 16th, 850 " @ 30c.		255 00	
		S. E. Ewell:			
June	15.	" July 25th, 350 " @ 25c.		87 50	

J. L. Hern:

May 30. About June 20th, 180 hours, @ 25c.. 45 00

F. Avery:

May 30. " June 20th, 230 " @ 25c.. 57 50

G. W. Dunnica:

March 14. " Aug. 1st, 766 " @ 25c.. 191 50

F. W. Woodson:

Apr. 18. " May 2d, 115 " @ 25c.. 28 75

Geo. Rider:

March 21. " May 2d, 286 " @ 25c.. 71 50

Fanner:

June 20. " July 11, 191 " @ 20c.. 38 20

F. Metcalf:

May 30. " June 6, 70 " @ 20c.. 14 00

Black:

June 20. " July 11, 32 " @ 20c.. 6 40

W. Zickner:

July 15. " July 11, 59 " @ 20c.. 11 80
Aug. 5. Frank Summerville, services..... 20 00
July 15. Sid. Bruce, machine-work..... 18 55
April 11. " " " " 15 00
May 23. Chas. Hinton, cartage 11 50
" " " " cash 4 75
Aug. 22. H. Colvert, cartage 21 15

2,517 30

21 Lumber invoice, Van Stone mill:

Jan'y	8th.	1 M B select, @ $3.50	$35 00
"	29.	547 ft. C box	21 88
Feb.	25.	544 ft. B select, @ $3.50	19 04
Mar.	3.	508 ft. B select, @ $3.50	17 27
"	13.	220 ft. D box, @ $2 50	5 50
"	"	12 piece- 2 x 4 x 16 ft. } @ $2.50	4 12
"	"	2 " 4 x 4 x 14 " }	
"	"	2 " 4 x 4 x 20 " @ $2	1 08
"	10.	4 " 2 x 4 x 16, @ $2.50	1 07
"	"	10 " 6 x 8 x 12 ft. } @ $2.15	15 84
"	"	4 " 6 x 8 x 14 ft. }	
"	"	12 " 3½ x 10 x 12 ft., @ $2.50	10 50
"	"	10 " 6 x 8 x 16, @ $2.25	17 28
"	"	4 " 8 x 10 x 16 } @ $2.50	15 35
		2 " 8 x 10 x 14 }	
"	"	2 M 1-in. partition, @ $2.75	55 00
"	"	4 M 1-in. A & B select, @ $3.75	150 00
"	"	2 M 1-in. flooring, @ $2.40	48 00
"	24.	516 ft. 1-in. B select, @ $3.50	20 48

Apr.	5.	516 ft. 1-in. B select, @ $3.50 440 ft. 1-in. B select, @ $3.50 360 ft. 1-in. C stock, @ $3.50 1,063 ft. 1-in. B select, @ $3.50	------	65 20	
May	28.	2 pieces 4 x 6 x 14; 1, 8 x 8 x 14	-----	3 66	
June	18.	1,242 1-in. B select, @ 3.50	----------	41 87	
					548 04
Am't forward from sheet # 20					2,517 30
" " " # 7					2,181 37
" " " # 8					282 69
		Total			5,429 40
22		To am't forward from sheet # 3			4,097 85
		" " # 5			236 65
		" " # 9			5,429 40
		Total			$9,763 90

1885.

Jan'y	16.	To contract price on mill		8,200 00	
		" extra material & labor furnished		236 65	
Jan'y	26.	By cash		----	450 00
May	7.	"		----	550 00
May	26.	" p'd Geo. T. Smith		----	813 75
Aug.	6.	" p'd Geo. T. Smith		----	1,200 00
Aug.	6.	" to store		----	30 37
		Balance due		----	5,392 53
				8,436 65	8,436 65

And there was attached to said petition a letter; which said letter is in words and figures following, to wit:

MARSHALL, MO., *Aug. 6th*, 1885.

F. J. Shupp, Esq., Marshall.

DEAR SIR: The flour mill put up by you for me is satisfactory to me and is hereby accepted. The corn rolls do not work to my satisfaction. Whenever such rolls are put in or shall do satisfactory work, I shall be ready to pay for the entire work.

C. H. VAN STONE.

23 And afterwards, to wit, on the 11th day of February, 1886, at the regular Feb'y term, 1886, of said circuit court, the following proceedings were had and made in said cause, to wit:

STILLWELL & BIERCE MANUFACTURING CO., Pl'ffs,
vs.
C. H. VAN STONE, Def't.

By consent defendant has leave to file answer in 60 days after term.

And afterwards, to wit, on the 18th day of February, 1886, at the regular Feb'y term, 1886, of said circuit court, the following further proceedings were had and made a part of the record, which is in words and figures following. to wit:

STILLWELL AND BIERCE MANUFACTURING CO., Pl'ffs, } No. 143.
vs. } On Mechanic's Lien.
C. H. VAN STONE, Def't. }

And now comes plaintiff and files petition, affidavit, and bond for the removal of this cause to the U. S. circuit court, the western division of the western district, and also a bond for cost. Said petition is heard and granted, and it is ordered that the venue of this cause be, and the same is hereby, changed and removed to the western division of the western district of the United States circuit court at Kansas City, and the clerk of this court is ordered to make up and transmit without delay a complete transcript of the proceedings herein, together with the original papers not forming a part of the record, to the clerk of said court at Kansas City.

24 Which said petition and affidavit is in words and figures following, to wit:

In the Circuit Court of Saline County, Mo. February Term, 1886.

STILLWELL & BIERCE M'F'G CO., Incorporated, Plaintiff, }
against }
CHARLES H. VAN STONE, Defendant. }

To the hon. circuit court of Saline county, Missouri:

Your petitioner, the above-named plaintiff, respectfully shows that it is a citizen of the State of Ohio, being a corporation duly incorporated under the laws of said State, and that the above-named defendant is a citizen of the State of Missouri, being a citizen of Saline county, in said State, and that your petitioner is plaintiff and the above-named Charles H. Van Stone is defendant in an action now pending in this court, wherein your petitioner seeks to recover a judgment against said defendant for the sum of five thousand three hundred and ninety-two & $\frac{53}{100}$ dollars, on account of work and labor done and material and machinery furnished by one Fred. J. Shupp to the defendant under a contract with the defendant, and also to enforce a mechanic's lien for said work and labor, material and machinery so furnished, against lots two (2) and three (3) of block one (1), in Alexander & Sandidge's Addition to the city of Marshall, Saline county, Missouri, and the buildings and improvements situated thereon, the claim of said Shupp having been for a valuable consideration assigned to your petitioner. Your petitioner further states that said action has not been tried in this court, and your petitioner desires to remove the same into the circuit court of the United States for the western division of the western district of the State of Missouri, in accordance with an act of Congress in that

25 behalf provided, to wit, the Revised Statutes of the United States, sec. 639, subd. 3. Your petitioner further states that

at the time said suit was brought your petition- was and still is a citizen of the State of Ohio, and said defendant, Charles H. Van Stone, was and still is a citizen of the State of Missouri, and that the amount in dispute between your petitioner and said Van Stone in this suit exceeds the sum of five hundred —, exclusive of interest and cost. Your petitioner further says he has filed the affidavit required by the *statements* in such cases, and offers herewith its bond, executed by —— —— as surety, in the penal sum of three hundred dollars, conditioned as by said act of Congress required. Your petitioner therefore prays that said bond may be accepted as good and sufficient according to said act of Congress, and that the said suit may be removed into the United States circuit court for said western division of the western district of Missouri, according to the act of Congress in such cases made and provided, and that no further proceedings be had therein in this court; and your petitioner will ever pray.

DAVIS & WINGFIELD,
Att'ys for Petitioner.

In the Circuit Court. February Term, 1886.

STATE OF MISSOURI, }
County of Saline. }

STILLWELL & BIERCE M'F'G CO., Incorporated, Plaintiff, }
vs. }
CHARLES H. VAN STONE, Defendant. }

Affidavit.

I, Samuel Davis, being duly sworn, on my oath do say that
26 I am a member of the firm of Davis & Wingfield, and as such we have exclusive charge and management of the legal affairs of Stillwell & Bierce M'f'g Co. of Dayton, Ohio, in and to a certain cause now pending in the circuit court of Saline county, Missouri, wherein said Stillwell & Bierce M'f'g Co. is plaintiff and Charles H. Van Stone is defendant, in which said plaintiff seeks to enforce a mechanic's lien against certain property of said defendant for the sum of five thousand three hundred and ninety-two and $\frac{53}{100}$ dollars ($5,392.53), which said lien was assigned to said plaintiff by one Fred. J. Shupp, and in which said suit the said Stillwell & Bierce M'f'g Co. desire to recover *quantum meruit* the sum of five thousand three hundred and ninety-two & $\frac{53}{100}$ dollars on account of work and labor done and material and machinery furnished by said Shupp to said Charles H. Van Stone, the account of said Shupp having been assigned to said Stillwell & Bierce M'f'g Co., and I, the said Samuel Davis, further state, on my oath, that I, as attorney for said Stillwell & Bierce M'f'g Co., have reason to believe, and do believe, that from prejudice and local influence the said Stillwell & Bierce M'f'g Co. will not be able to obtain justice in said State court.

SAM'L DAVIS.

Subscribed by the said Samuel Davis in my presence and by him sworn to before me, at my office, in the city of Marshall, in the State of Missouri, this the 17th day of February, 1886.

G. W. LANKFORD, *Clerk*,
By ED. T. OREAR, *D. C.*

And which said bond for removal is in the words and figures following, to wit:

27 Know all men by these presents that we, The Stillwell & Bierce Manufacturing Co. of Dayton, Ohio, as principal, and John H. Cordell, as surety, are hereby held and firmly bound unto Charles H. Van Stone in the penal sum of three hundred dollars; for the payment of which, well and truly to be made, we bind ourselves, jointly and severally, by these presents. The condition of this obligation is such that if the above-bounden principal, The Stilwell & Bierce Manufacturing Co., shall enter and file or cause to be entered and filed in the next circuit court of the United States for the western division of the western district of Mo. on the first day of its next session copies of all process, pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the circuit court of Saline county, Missouri, in which The Stilwell & Bierce Manufacturing Co. of Dayton, Ohio, is plaintiff and Charles H. Van Stone is defendant, and shall do such other appropriate acts as by the acts of Congress in that behalf are required to be done upon the removal of such suit from said State court into the said United States court, then this obligation to be void; otherwise to remain in full force.

In witness whereof the said Stilwell & Bierce Manufacturing Co. has caused this writing to be signed, sealed, and delivered by E. R. Stilwell, its president; and in further witness whereof said John H. Cordell, as surety, has hereto signed his name and affixed his seal this second day of February, 1886.

STILWELL & BIERCE M'F'G CO., [SEAL.]
By E. R. STILWELL, *Pres't.*
J. H. CORDELL. [SEAL.]

28 Which said bond for costs is in words and figures following, to wit:

In the Circuit Court of Saline County, Mo. February Term, 1886.

THE STILWELL & BIERCE MANUFACTURING CO., Incorporated, Plaintiff,
against
CHARLES H. VAN STONE, Defendant.

We, The Stilwell & Bierce Manufacturing Co. and J. H. Cordell, do hereby acknowledge ourselves bound to pay all costs which have accrued or may accrue in the above-entitled cause.

Witness our names and seals this second day of February, 1886.

STILWELL & BIERCE M'F'G CO., [SEAL.]
By E. R. STILWELL, *Pres't.*
J. H. CORDELL. [SEAL.]

STATE OF MISSOURI, } *ss:*
County of Saline, }

I, George W. Lankford, clerk of the circuit court within and for the county of Saline, hereby certify that the above and foregoing is a true and complete transcript of the record and proceedings in the above-entitled cause as fully as the same is of record or on file in my office.

Witness my hand, with the seal of said court annexed, [SEAL.] this the 9th day of April, A. D. 1886, at my office, in Marshall, Mo.

G. W. LANKFORD, *Clerk,*
By E. T. OREAR, *D. C.*

29 And afterwards, to wit, on the 6th day of May, 1886, defendant filed his answer, which is in words and figures as follows:

In the United States Circuit Court for the Western Division of the Western District of Missouri.

STILLWELL & BIERCE M'F'G Co., Incorporated, Plaintiff, }
against
CHARLES H. VAN STONE, Defendant. }

Now comes the defendant and for his answer to plaintiff's petition says he has no knowledge or information sufficient to form a belief as to whether plaintiff is duly incorporated under the laws of the State of Ohio or whether plaintiff is incorporated, and has no knowledge or information sufficient to form a belief as to whether plaintiff, as a corporation, has any power to contract or to sue or as to whether it had any power to make the contract alleged to have been made with one Fred. J. Shupp, and on which this action is founded.

Defendant, further answering, says it is true that he contracted with Fred. J. Shupp, about the 16th day of January, 1885, to build for defendant a flouring mill on the ground mentioned in plaintiff's petition, and that the terms of said contract were the same as stated in said petition, except that said written contract contained a further provision that in the event there should be a deduction in the price to be paid said Shupp for said mill, as provided for in said contract, on account of its failure to comply with said contract, the same should be deducted from the three notes provided for in said contract, *pro rata.*

And defendant admits that he paid to said Fred. J. Shupp the

sums of money mentioned in plaintiff's petition, aggregating
30 three thousand and forty-four & $\frac{12}{100}$ dollars, at the dates mentioned in said petition.

But defendant denies that the said Shupp fully complied with said contract, except as to the time in which it was completed; and denies that defendant, by an instrument in writing or otherwise, waived his right to demand a full compliance with said contract as to time; and denies that he agreed that whenever the part of said mill intended for corn was so completed as to do satisfactory work that he would pay for the entire work; and denies that he accepted that part of said work as was intended for making flour; and denies that afterwards said Shupp completed said mill and fully complied with said contract; and denies that said Frank Somerville examined and tested said mill, as provided by said contract, and accepted the same on the 16th day of October, 1885, or at any other time; and denies that defendant then and there promised and agreed to pay for said mill and received and accepted the same; and denies that he waived all obligations on account of said mill being completed within the time required by said contract; and defendant denies that said Shupp, at the instance and request of defendant, furnished and placed in said mill extra material and machinery not embraced in said contract and performed extra work and labor, for which defendant agreed and promised to pay; and denies that said Shupp furnished extra material and performed extra work and labor to the amount of two hundred and thirty-six dollars and sixty-five cents; and defendant denies that there is due plaintiff, after deducting payments made, the sum of five thousand three hundred and ninety-two & $\frac{53}{100}$ dollars on account of said original contract or any subsequent contract or upon any
31 account whatever; and defendant denies that he has failed to comply with his part of said contract; and defendant denies each and every other allegation of the first count of plaintiff's petition.

Defendant, further answering, denies each and every allegation of the second count of plaintiff's petition.

Defendant, further answering, states the facts to be that about the 16th day of January, 1885, he entered into a contract in writing with the said Fred. J. Shupp, by which the said Fred. J. Shupp agreed and bound himself to build for defendant, in defendant's elevator building at Marshall, Mo., a flouring mill, for the purpose of manufacturing flour, meal, and breadstuffs upon what is commonly known as the roller system, he, the said Fred. J. Shupp, to furnish all machinery and material and labor in the construction of said mill except such machinery as was then in said building, and to use in the construction of said mill good and durable material and to perform the work in first-class style, with the capacity of manufacturing from fifty to seventy-five barrels of flour and from 300 to 400 bushels of corn into meal per day of 24 hours, the quality and quantity of flour and meal produced to be of first class and up to the standard of first-class mills, and the quantity produced in proportion to the quantity of grain used also to be up to the standard of

first-class mills, he, the said Shupp, to make all necessary connections between the engine and other machinery, and have the mill complete and ready for delivery to defendant by the first day of August, 1885, for which defendant agreed to pay him the sum of eight thousand two hundred dollars, as follows: $500.00 on April 1st, 1885; $500 on May 1st, 1885, and $1,200.00 on delivery of mill complete; that at the time of entering upon said contract the said Fred. J. Shupp was a professional millwright, and professed
32 especially to understand the building and construction of roller mills, and at the time selected and specified the particular kind of machinery to be used in the construction of said mill.

That the said Shupp failed to have said mill complete by the 1st day of August, 1885, but that the defendant, from the statements made by said Shupp to him to the effect that that part of the mill to be used for the purpose of making flour was complete and up to the contract with the exception of a few immaterial changes to be made, was induced by said Shupp to believe the same was all right and would perform as was intended by the said contract, and at the urgent request of said Shupp gave said Shupp the writing filed with the plaintiff's petition, marked Exhibit "A," but with the full understanding that if said part of said mill was not all right and did not come — to the said contract that said Shupp would make the same perform according to his contract; and that the defendant, having confidence in said Shupp at the time and believing that he would fully perform his part of the said contract, also paid to him on that day the sum of twelve hundred dollars, although there was no pretence that said sum or any other sum was due at that time on said contract, but that the same was paid at the urgent request of said Shupp as an accommodation to him.

That immediately after said writing was given it was discovered by said Shupp and by defendant that that part of said mill constructed for the manufacture of flour did not perform its work in accordance with said contract, either as to the quantity of flour made from grain used in the proportion of a first-class mill or as to the quality of flour produced or the quantity of flour made per
33 day, and that the said Shupp then, to wit, on the 28th day of August, 1885, undertook to alter and rearrange said mill and to add other machinery thereto in order to make said part of said mill such as required by said contract, but that he has never made said part of said mill operate or so that it could operate in accordance with said contract; that said Shupp has also failed to put up that part of said mill included for the manufacture of meal in accordance with said contract, and that said mill has never been constructed so as to produce first-class flour or meal in the same proportion from the quantity of grain used as a first-class mill should do, or so as to produce either the quantity or quality of flour a first-class mill should produce.

That, on the contrary, the said Shupp so constructed said mill that it does not produce first-class flour and does not produce the quantity of flour from a bushel of wheat that a mill should produce,

nor does it produce the quality of flour a mill of the kind contracted for and intended should produce.

That in the construction of said mill the said Shupp used other and different machinery than that called for in the contract and far inferior to that specified in the contract; that he has entirely failed to arrange said machinery so as to perform its work properly, and that the same is arranged in an unskillful manner, and the work done upon the same is not done in a first-class workmanship style, and that said Shupp has failed in every way to perform his part of said contract, and that the structure made by said Shupp is of no value whatever as a mill.

That when, on the 1st of August, 1885, the said Shupp had failed to have said mill complete and ready for delivery the defendant was willing to allow him a reasonable time in which to com-
34 plete said mill, but that said Shupp wholly failed to complete said mill in a reasonable time, and never has completed the same; that about the 16th day of October, 1885, the said Shupp abandoned said mill, and has since that time failed and refused to complete the same.

That by reason of the failure of said Shupp to perform his part of said contract defendant has lost the use of said mill since the 1st day of August, 1885, and has otherwise been damaged. in all to the amount of six thousand dollars, for which defendant asks judgment.

BOYD & SEBREE, *For Def't.*

We, as attorneys for the Stilwell & Bierce Manufacturing Company, hereby waive all exceptions as to the time of filing the above and foregoing answer.

DAVIS & WINGFIELD,
Att'ys for Pl'ffs.

35 Afterwards, at the regular May term of said court, and on the 17th day of May, A. D. 1886, the following entry appears of record, to wit:

STILLWELL & BIERCE M'F'G CO.
against
C. H. VAN STONE. } 1128.

This day comes plaintiff, by its attorneys, Messrs. Davis & Wingfield, and files motion to make William Small, Jr., William M. Johnson, Chastain G. Page, and Peter H. Rea parties defendant to this cause; thereupon come said-named persons, by their attorneys, Messrs. Hatch & Middlebrook, and enter their appearance herein.

Afterwards, on Saturday, May 22nd, 1886, the following entry appears of record in said cause, to wit:

STILLWELL & BIERCE M'F'G CO.
against
C. H. VAN STONE. } 1128.

This day comes plaintiff, by its attorneys, and files reply to defendant's answer.

Said reply is in words and figures as follows, to wit:

In the United States Circuit Court for the Western Division of the Western District of Missouri.

STILWELL & BIERCE M'F'G CO., Incorporated, Plaintiff,
against
CHARLES H. VAN STONE, Defendant.

Now comes the plaintiff and for reply to the answer of defendant denies each and every allegation of new matter therein contained,
36 and, reaffirming the allegations of the petition, asks judgment as therein prayed for.

DAVIS & WINGFIELD,
Att'ys for Plaintiff.

Afterwards, at the October term of said court, and on the 11th day of November, A. D. 1886, the following entry appears of record:

STILLWELL & BIERCE M'F'G CO.
against
C. H. VAN STONE. } 1128.

This day a stipulation of parties is filed continuing this case.

And at the May term, A. D. 1887, and on the 17th day of May the following entry appears of record in this cause, to wit:

STILLWELL & BIERCE M'F'G CO.
against
C. H. VAN STONE. } 1128.

This cause is continued by stipulation.

Afterwards, to wit, at the regular October term, A. D. 1887, and on Saturday, November 5th, 1887, the following entry appears of record in this cause:

STILLWELL & BIERCE M'F'G CO.
against
C. H. VAN STONE. } 1128.

This day come the parties, by their attorneys, the plaintiff by Davis & Morrow and the defendant by Boyd & Sebree. Thereupon plaintiff takes leave to amend its petition and defendant takes like leave to file answer thereto; and this case being regularly called for trial it is ordered that a jury come, to wit, W. L. Belcher, Austin
37 Moore, George Haux, G. W. Bogard, John H. Bradley, E. H. Johnson, Ed. E. Estle, J. C. Hale, R. S. Catron, E. D. Canon,

John Snyder, J. C. Gates, twelve good and lawful men, who were sworn to well and truly try the issues joined.

Thereupon testimony is heard, and, the hour of adjournment having arrived, it is ordered that further proceedings be postponed till Monday morning.

And on Monday, November 7th, 1887, the following proceedings were had in this cause, to wit:

The plaintiff, having first obtained leave of court, files herein its amended petition. The defendant also, by leave of court, files his answer thereto; thereupon the plaintiff refiles its reply heretofore filed as its reply to the answer of defendant.

Said amended petition is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri. October Term, 1887.

STILLWELL & BIERCE MANUFACTURING COMPANY, Plaintiff,
vs.
CHARLES H. VAN STONE, Defendant.

Plaintiff for its amended petition, by leave of court first had and obtained, states that it is a corporation duly incorporated under the laws of the State of Ohio, and that as such entitled to contract and be contracted with and to sue and be sued; that on the 16th day of January, 1885, one Fred. J. Shupp entered into a contract with the defendant, by which said Shupp agreed to build in the elevator building of the defendant, situated in the north part of the city
38 of Marshall, Saline county, Missouri, said elevator building being situated on lots two (2) and three (3), block one (1), of Alexander & Sandidge's Addition to said city of Marshall, a flouring mill for the manufacture of flour, meal, and breadstuffs, and in constructing said mill said Shupp agreed to furnish all the material except such as was then on said premises and to do all the work and be at all of the expense, the materials and articles to be used in the construction of said mill being set forth in a paper attached to said contract and made a part thereof by the parties thereto; said material to be good and durable and the workmanship to be first class. It was also agreed that said Shupp should make all necessary connections between the engine and other machinery, and that said mill should be completed and ready for delivery before the first day of August, 1885. It was further agreed that the capacity of said mill should be from fifty to seventy-five barrels of flour and from three hundred to four hundred bushels of corn per day of twenty-four hours; and the work of said mill as to the quality of flour and meal manufactured should be first class, and the quantity of flour and meal produced by said mill, in proportion to the wheat and corn used, should be up to the standard of other mills, and particularly the Aulville mill, of Aulville, Missouri, as to quality and quantity of meal produced in proportion to grain used. It was further agreed that when said Shupp was ready to deliver said mill to defendant upon its comple-

tion he should notify the defendant of said fact, and one Frank Summerville should be requested to go to said mill and to test the same; said Shupp, at his own expense, to put said mill
39 in operation, the defendant to furnish fuel and grain, and said Summerville should decide whether or not said mill was constructed and operated in accordance with the terms of said contract, and if said Summerville decides that said mill operated and was constructed in the manner required by said contract, then said mill should be delivered to the defendant; but if said Summerville decides that said mill was not built or did not operate according to said contract, he should, if in his power, notify said Shupp of what the deficiency consisted and said Shupp should have fifteen days in which to correct said deficiency, and at the end of said time the said Summerville should again examine and test said mill as before, and if he decides that the same complied with said contract it should be delivered to the defendant; but if he decided that said mill did not comply with said contract he should make an estimate and ascertain what amount ought to be deducted from the contract price for said mill on account of said failure to comply with said contract, and said mill should be delivered to the defendant and the decision made by said Summerville should be final upon said parties to said contract. In consideration of the compliance by said Shupp with his part of said contract the defendant agreed to pay said Shupp the sum of eighty-two hundred dollars ($8,200), as follows: On the first day of April, 1885, five hundred dollars ($500); on the 1st day of May, 1885, five hundred dollars ($500); and when said mill is delivered to him, the sum of twelve hundred dollars ($1,200); and at the time of said delivery the said Van Stone was to execute to the said Shupp his three promissory notes, each for the sum of two thousand dollars ($2,000), one to mature in one (1) year after date, one in two (2) years after date, and the third in
40 three (3) years after date, all bearing interest from date at the rate of seven per cent. (7%), the interest to be paid annually, said notes to be well secured on real estate, and the sufficiency of the security to be determined by Will. H. Wood, Esq., of Marshall, Missouri, or, in case he fail to act, by J. H. Cordell, of Marshall, Missouri.

Plaintiff states that after entering into said contract said Shupp fully complied with the same, and built said mill and furnished the machinery therefor, as in said contract required, except that said Shupp did not complete said work within the time required by said contract in this, that the part of the machinery intended for the grinding of corn did not work to the satisfaction of said Van Stone at the time when said contract should have been completed, but that the said Van Stone, by an instrument in writing filed with the original petition in this case, marked "Exhibit A," waived his right to demand a full compliance with said contract as to time, and agreed when that part of said mill intended for grinding corn was so completed as to do satisfactory work that he would pay for the entire work, and said Van Stone by said writing accepted all that part of said work which was intended for making flour; that

afterwards said Shupp completed said mill and fully complied with said contract, and said Frank Summerville examined and tested the same, as provided by said contract, and accepted the same on the 16th day of October, 1885, and the defendant then and there promised and agreed to pay for said mill in accordance with the terms of said contract, and thereupon said mill was turned over to said Van Stone and accepted by him, said defendant then and there waiving all exceptions on account of said mill not being completed within the time required by said contract; that defendant has paid
41 said Shupp on said contract the following sums, to wit: January 26th, 1885, $450.00; May 7th, 1885, $550.00; May 26th, 1885, $813.75; Aug. 6th, 1885, $1,200.00; August 6th, 1885, $30.37, making a total of $3,044.12.

Plaintiff further states that, although said Shupp complied with the terms of said contract as aforesaid and furnished the material and machinery as aforesaid, defendant, with the exception of paying the amounts credited above, has failed to comply with his part of said contract by paying the amount and executing the notes as above set forth, as specified in said contract, and wholly failed and refused to pay for said material and machinery furnished by said Shupp as aforesaid.

Plaintiff further states that said Shupp was the original contractor with the defendant for the performance of said contract and for furnishing all the material and machinery as aforesaid, and was entitled to a lien upon said building and the lots upon which the same is situated for all the work and labor performed and all the material and machinery furnished under said original contract, and that for the purpose of securing said lien, as provided by law, said Shupp, as original contractor, did, on the 21st day of December, 1885, and within six months after the completion of said mill as aforesaid and after the last item of work, material, and machinery were furnished as aforesaid, filed with the clerk of the circuit court of Saline county, Missouri, a just and true account of the demand due him, after all just credits had been given, and a true description of the property, or so near as to identify the same, upon which the lien was intended to apply, with the name of the owner of said property, to wit, Charles H. Van Stone, and of the contractor, to wit, said Fred. J. Shupp, describing the said real estate upon which said mill is situated as lots two (2) and three (3), in block one (1), Alexander & Sandidge's
42 Addition to the city of Marshall, Saline county, Missouri, and described said mill as one three-story mill, with basement and elevator-room attached, said mill being forty feet by sixty feet in size and about forty-five feet in height above basement, the elevator-room being on north side sixteen by sixty feet and about forty feet high, also an engine and fuel room attached on the east side, being about fifty-six feet by forty feet and about eighteen feet high; that the defendant was then and now is the owner of said property, and said Fred J. Shupp was the original contractor for the performance of said contract and furnishing such material and machinery, and the said account and statement filed with the circuit court as aforesaid was verified by the oath of said Fred. J. Shupp, as required

by law; that an itemized account of all the work and labor performed and all the materials and machinery furnished and placed in the mill of the defendant aforesaid by said Shupp, together with the credits to which defendant is entitled, is filed herewith and marked "Exhibit B;" and that by reason of the premises said Shupp became and was entitled to a mechanic's lien upon the real estate aforesaid and on the buildings and improvements situated thereon to the extent of his demand against the defendant as aforesaid, to wit, the sum of $5,392.53; that afterwards, to wit, on the 21st day of December, 1885, the said Shupp, for value received, assigned, transferred, and set over to plaintiff all his accounts against defendant for work and labor, material and machinery furnished as aforesaid, and also his mechanic's lien upon said property, so filed as aforesaid, and by said assignment, which was in writing, signed by said Shupp, authorized said plaintiff to enforce said lien and
43 collect said account according to law. Plaintiff therefore states that by reason of the premises it is entitled to recover from defendant said sum of $5,392.53, with interest thereon from the 16th day of October, 1885, the time when said money became due, that being the time when payment of the same was demanded by said Shupp, and that plaintiff is also entitled to a mechanic's lien on the property above described.

Wherefore plaintiff prays judgment against the defendant for the sum of $5,392.53, with interest and costs, and that the same be declared a lien upon the property aforesaid, as provided by law.

Plaintiff, for another count and statement of his cause of action against defendant, states that on the 16th day of January, 1885, one Fred. J. Shupp agreed with the defendant to perform certain work and labor and to furnish certain material and machinery and to fit up for defendant a certain flour and grist mill in the city of Marshall, Saline county, Missouri, for the manufacture of flour, meal, and breadstuffs, for which defendant agreed to pay said Shupp what said work and labor and machinery were reasonably worth, and, in pursuance of said agreement, said Shupp did perform work and labor and furnish material and machinery in the fitting up of said mill between the 16th day of January, 1885, and the 16th day of October, 1885. An itemized account of all said work and labor performed and materials and machinery furnished, together with the credits due thereon, is filed herewith in this case and marked "Exhibit B" and referred to in the first count of this petition; that the work and labor performed and material and machinery furnished by said Shupp was reasonably worth the sum of $8,436.65, of which amount defendant has paid said Shupp the sum of $3,044.12 on the
44 dates set forth in the said account, leaving due said Shupp a balance of $5,392.53, which has not been paid; that such work and labor was performed and material and machinery furnished as aforesaid in the fitting up of a mill owned by the defendant, situated on lots two (2) and three (3), block one (1), Alexander & Sandidge's Addition to the city of Marshall, Saline county, Missouri, and that by reason of the premises said Shupp became and was entitled to a mechanic's lien on said mill and to the lots on

which said mill is situated to the extent of his demand as aforesaid, to wit, the sum of $5,392.53, and that for the purpose of securing said lien, as provided by law, the said Shupp, as original contractor, did, on the 21st day of December, 1885, and within six months after the completion of said mill as aforesaid, file with the clerk of the circuit court of Saline county, Missouri, a just and true account of the demand due him, after all just credits had been given, and a true description of the property, or as near as to identify the same, upon which the lien was intended to apply, together with the name of the owner of said property, to wit, the defendant, Charles H. Van Stone, and of the contractor, to wit, Fred. J. Shupp, describing the real estate upon which said mill is situated as lots 2 (two) and three (3), block one (1), Alexander and Sandidge's Addition to the city of Marshall, Saline county, Missouri, and described said mill as one three-story mill, with basement and elevator-room attached, said mill being 40 feet by 60 feet in size and about 45 feet in height above the basement, the elevator-room being on the north side 16 feet by 60 feet and about 40 feet high; also an engine and fuel room attached on the east side, being about 56 feet by 40 feet and about 18 feet high; that said defendant was then and is now the owner of said property. Said Fred. J. Shupp was the original contractor for the performance of said work and labor and the furnishing of said materials and machinery, and the said account and statement filed with the circuit clerk as aforesaid was verified by the oath of said Fred. J. Shupp, as required by law, and that by reason of the premises said Shupp became and was entitled to a mechanic's lien on the real estate aforesaid and on the buildings and improvements situate thereon to the extent of his demand against defendant as aforesaid, to wit, the sum of $5,392.53; that afterwards, to wit, on the 21st day of December, 1885, said Shupp, for value received, assigned, transferred, and set over to plaintiff all his accounts against the defendant for work and labor, machinery and materials, furnished as aforesaid, and also his mechanic's lien on said property, so filed as aforesaid, and by said assignment, which was in writing, signed by said Shupp, authorized plaintiff to enforce said lien and to collect said account, according to law.

Plaintiff therefore states that by reason of the premises it is entitled to recover from the defendant the sum of $5,392.53, with interest thereon from the 16th day of October, 1885, the time when said money became due, that being the time when said money was demanded by said Shupp, and that plaintiff is also entitled to a mechanic's lien upon said property above described.

Wherefore plaintiff prays judgment against defendant for said sum of $5,392.53, with interest and costs, and asks that the same be declared a lien on the property aforesaid, as provided by law.

Wherefore plaintiff *plaintiff* prays judgment against defendant for said sum of $5,392.53, with interest and costs, and asks that the same be declared a lien on the property aforesaid, as provided by law.

46 Plaintiff, for another account and a further cause of action against the defendant, states that after the completion of the mill of the defendant, as stated in the first count of this petition, the plaintiff did extra work and furnished extra material in said mill not called for in the contract referred to in the two first counts of this petition, at the special instance and request of the defendant, for which the defendant agreed and promised to pay plaintiff what said extra material and extra work was reasonably worth; that the extra work and material done and furnished by the plaintiff was reasonably worth the sum of $230.15, as shown by an itemized statement of account thereof which is herewith filed and marked "Exhibit C," showing the items thereof, and that the last item thereof was so furnished on the 30th day of September, 1885; that said extra work was included in the mechanic's lien filed by said Fred. Shupp as aforesaid and was a part thereof, and that said defendant has never paid for said extra work.

Plaintiff further states that said Shupp was the original contractor with the defendant for the performance of said contract and for furnishing all the material and machinery as aforesaid and for doing said extra work and furnishing said extra material, and was entitled to a lien upon said mill building and the lots upon which the same is situated for all the work and labor performed and machinery furnished under the original contract, and also for the extra work and material furnished by said Shupp, mentioned in the account herewith filed, and that for the purpose of securing said lien as provided by law said Shupp, as

47 original contractor, did, on the 21st day of December, 1885, and within six months after the completion of said mill as aforesaid, and after the last item of work, material, and machinery were furnished as aforesaid, file with the clerk of the circuit court of Saline county, Missouri, a just and true account of the demand due him, including the account for extra work above stated, after all just credits had been given, and a true description of the property, or so near as to identify the same, upon which the lien was intended to apply, with the name of the owner of said property, to wit, Charles H. Van Stone, and of the contractor, to wit, said Fred. J. Shupp, describing the said real estate upon which said mill is situated as lots two (2) and three (3), in block one (1), Alexander and Sandidge's Addition to the city of Marshall, Saline county, Missouri, and describing the said mill as one three-story mill, with basement and elevator-room attached, said mill being 40 feet by 60 feet in size and about 45 feet in height above basement, the elevator-room being on the north side 16 by 60 feet and about 40 feet high; also an engine and fuel room attached on the east side, being about 56 feet by 40 feet and about 18 feet high; that the defendant was then and is now the owner of said property, and said Fred. J. Shupp was the original contractor for the performance of said contract and furnishing such material and machinery and for the doing of said extra work and furnishing said extra material, and the said account and statement of all said work performed by said Shupp, including said extra work and labor, was filed with the circuit clerk, as stated

in the first count of the petition, and was verified by the oath of said Fred. J. Shupp, as required by law; that an itemized
48 account of all the work and labor performed and all the materials and machinery furnished and placed in the mill of the defendant aforesaid by said Shupp, together with the credits to which the defendant is entitled, is herewith filed, marked Exhibit "B," and that a separate account of said extra work and labor and materials furnished is also herewith filed and marked Exhibit C; that the items mentioned in said separate account for extra work and labor were included in the mechanic's lien filed by said Shupp and constituted a part of the account filed with said mechanic's lien, and that by reason of the premises the said Shupp became and was entitled to a mechanic's lien on said mill and upon the lots upon which the same is situated, to wit, lots two (2) and three (3), in block one (1), Alexander & Sandidge's Addition to the city of Marshall, Saline county, Missouri. Afterwards said Shupp, for value received, assigned and transferred said account for extra work to this plaintiff, and also his mechanic's lien on said property so filed as aforesaid, and by said assignment, which was in writing, signed by said Shupp, authorized plaintiff to enforce said lien and to collect said account according to law. Plaintiff therefore states that by reason of the premises it is entitled to recover from the defendant the said sum of $230.15, with interest thereon from October 16th, 1885, the time when said money became due, that being the time when said money was demanded by said Shupp, and that plaintiff is also entitled to a mechanic's lien upon said property above described.

Wherefore plaintiff prays judgment against defendant for said sum of $230.15, and asks that the same be declared a lien upon the property above described, and that said lien be enforced according to law.

LATHROP & SMITH &
DAVIS & WINGFIELD,
Attorneys for Plaintiff.

49 *Chas. H. Van Stone in Ac. with Fred. J. Shupp.*

1885.				
May 12.	3 7 x 14 style C roller mills	1,575 00		
	3 7 x 14 roller mills, imp., $500	1,500 00		
		3,075		
	Less 30 & 10	1,137 25		
				1,937 75
	2 # 1 Richmond bran duster-, $200	400		
	1 # 2 Richmond smut-er	135		
	1 # 2 " brush machine	250		
		785		
	Less 40 & 5%	337 55		
				447 45

	1 single aspirator	80		
	Less 25%	20		
				60
	1 Eureka magnetic separator	45		
	Less $\frac{1}{4}$	11 25		
				33 75
	1 flour packer, 4 tubes			75
	6 pulleys, 48 x 5, 21.20	127 20		
	2 " 48 x 9, 30.65	61 30		
	1 " 30 x $4\frac{1}{2}$	9		
	2 " 30 x 5, 9.45	18 90		
	3 " 40 x 5, 15.30	45 90		
	2 " 30 x 4, 8.55	17 10		
	1 " 28 x 5	8 50		
	21 " 20 x $4\frac{1}{2}$, 5.25	110 25		
	1 " 20 x $6\frac{1}{2}$	6 50		
	2 " 20 x $3\frac{1}{2}$, 4.70	9 40		
	5 #45 sprockets, 12" dia., 2.90	14 50		
	1 #45 " 10" "	2 30		
50	1 #33 sprockets, 10" dia.	2 00		
	2 #88 " 37", 11.50	23 00		
	1 #88 " $12\frac{1}{4}$ dia.	3 60		
	1 #88 " 12" dia. idler, with boxes and shaft	10 03		
	$39\frac{1}{6}$ ft. $2\frac{7}{16}$" shafting, 1.30	50 91		
	$147\frac{3}{4}$ ft. $1\frac{15}{16}$" shafting, .87	128 54		
	$10\frac{1}{6}$ ft. $1\frac{7}{16}$" shafting, .60	6 10		
	$11\frac{1}{6}$ ft. $1\frac{11}{16}$" shafting, .70	7 81		
		662 84		2,553 95
	6 bracket boxes, $2\frac{7}{16}$", 6.25	37 50		
	3 flat boxes, $1\frac{15}{16}$, 3.25	9 75		
	1 " " $1\frac{7}{16}$	2 25		
	2 collars, $2\frac{7}{16}$, 0.95	1 90		
	8 " $1\frac{15}{16}$, .85	6 80		
	2 " $1\frac{11}{16}$, .80	1 60		
	4 upright step box-, $1\frac{15}{16}$, 4.00	16 00		
	1 " " $1\frac{11}{16}$	4 00		
	1 pair coupling, $2\frac{7}{16}$	8 25		
	1 " " $2\frac{7}{16}$ & $4\frac{7}{16}$	30 00		
	3 " " $1\frac{15}{16}$, 7.00	21 00		
	1 " " $1\frac{15}{16}$ & $3\frac{7}{16}$	16 00		
	$136\frac{1}{2}$ ft. of 3 standard leather belt, .33	45 05		
	255 ft. of $4\frac{1}{2}$" standard leather belt, .51	130 05		
	26 ft. of 4" standard leather belt, .45	11 70		
	$35\frac{2}{3}$ ft. of $3\frac{1}{2}$" standard leather belt, .39	13 91		
51	107 ft. of 6" cotton belt, .24	25 68		
	$1,823\frac{1}{4}$ ft. 4" " " .16	291 72		
	80 elevator cups, $5\frac{1}{2}$ x 4, .16	12 80		

	1,370 elevator cups, 3½ x 3, .09		123 30	
	2,900 elevator bolts, .01		29 00	
			1,501 10	
	Less 40 & 10%		690 50	
				810 60
	224 ft. of short lap leather, .51		114 24	
	Less 40%		45 70	
				68 54
	38½ ft. of 8" 4-ply rubber belt, .80		32 34	
	Less 50%		16 17	
				16 17
	8 brackets for bolt chest upright, 1.00		8 00	
	8 meters & sprockets combined 8 14" milters 4 p'r iron bevel #104, Greenwald 1 p'r iron bevel #1035, Greenwald 2 p'r iron bevel #1170, Greenwald	987#, @ 6c.	----	59 22
	2 spin wheels, #768, Ham & Bodly, #488, @ 7c.		----	34 16
	3 Odell corn mills		----	195 00
July 2.	26 7/12 — bolting cloth, #14 3.80		101 02	
	24 7/9 — " " #13 3.50		86 72	
	5 19/36 — " " #9 2.50		13 26	
	4 yds. #8 bolting cloth, 2.40		9 60	
	6 " #6 " " 2.20		13 20	
	2⅔ yds. #3 bolting cloth, 1.80		4 80	
	1⅓ yds. #0 " " 1.40		1 87	
	7⅑ yds. Grirz gauze, 3.00		21 33	
			251 80	
	Less 35%		88 13	
				163 67
52	Making and furnishing 122⅓, 25		----	30 58
	30 sq. ft. #22 wire, .20		6 00	
	30 " #24 "		6 00	
	30 " #26 " .22		6 60	
	22½ sq. ft. #18 " .16		3 60	
	31¾ sq. ft. #80 wire 1.05		33 33	
	Less 40%		21 97	
				32 96
May 12.	To 1 #5 heater nut			125 00
	Total			4,097 85

53 *Charles H. Van Stone to Fred. J. Schupp, Dr.*

To extra material furnished and labor performed.

Jan'y	13.	To ½ fee for writing contract	2 50
March	14.	" laying 2nd floor in mill, 53 hours, @ 25c.	13 25
April	15.	To difference in pulley, 22" x 48", to the K. C. I. W. Co., K. C.	3 75
May	18.	freight on heater, 1000#, @ 40c.	4 00
June	11.	10 hours' services, change blast to elevator	2 50
June	19.	10 hours' services, change blast to elevator	2 50
June	20.	10 hours' services, change blast to elevator	2 50
"	"	10 hours' services, change drive E. C. machinery, Bruce	3 00
June	22.	10 hours' services, change drive E. C. machinery, Bruce	3 00
"	"	12 ft. shafting, @ 51c. net	6 12
"	"	2 pulleys, 4½" x 20", @ 3.12	6 24
"	"	2 metal boxes, $1\frac{7}{16}$", @ $1.32 net	2 64
"	"	3 ft. $1\frac{7}{16}$" shafting, @ 40c. p'r ft. net	1 20
"	"	2 set- collars, $1\frac{7}{16}$", @ 60c. net	1 20
"	"	2 set collars, $1\frac{3}{16}$", @ 85c. net	1 70
"	"	1 p'r 10" miter wheel, @ 7c. p'r #	2 45
"	"	3 metal boxes, $1\frac{15}{16}$, @ $1.80 net	5 40
	June 22.	To No. 1 reel belt-tighteners	20 00
54	June 22.	To 10 hours' services, self, putting in same	4 50
June	22.	To Sid. Bruce, for furnishing pulleys	6 50
"	19.	2 pulleys, 9" x 24", @ $6.12 net	12 24
"	22.	10 hours' services, setting corn-sheller	2 50
"	23.	6 hours' services, extra wheat spout, @ 30c.	1 80
"	"	10 hours' services, extra wheat spout	2 50
"	"	1 pulley, 3" x 6", @ $1.50 net	1 50
"	"	18 ft. 3" standard leather belts, @ 20c. net	3 60
"	30.	10 hours, services screening spout	2 50
"	31.	10 " " " and in engine-room	2 50
July	17.	4 grate bars, 50# each, @ 2c. p'r #.	4 00
"	"	4 sections gas-pipe, 1¼" x 12", @ 5c. net	2 40
Aug.	28.	9 ft. of 11" x 11", @ $1.00 net	9 00
			139 49

55 *Chas. H. Van Stone to Fred. J. Schupp, Dr.*

Aug.	28.	To 104 ft. lumber, @ 3½c. p'r	3 64	
"	"	" 3 gross screws, 1½" X, No. 10	1 20	
"	29.	60 hours' services, Bowman, @ 30c.	18 00	
"	"	60 hours' services, Dunnica, @ 25c.	15 00	
"	"	30 hours' services, Sims, @ 22½	6 75	
Sept.	5.	40 hours' services, Dunnica, @ 25c.	10 00	
"	7.	10 hour's services, Dunnica, @ 25c.	2 50	
"	10.	9 hours' services, Sims, @ 22½c.	2 00	
"	11.	6 " " " "	1 35	
"	21.	2 pulleys, 4" x 20", $3.70 net	7 40	
"	"	1 elevator head, 4" x 20	6 00	
"	21.	10 hours' services, Sims, @ 22½c.	2 25	
"	"	10 " " Ewell, @ 25c.	2 50	
"	"	10 " " self, @ 45c.	4 50	
"	22.	9 " " " @ 45c.	4 05	
"	"	10 " " Sims, @ 22½	2 25	
"	"	10 " " Ewell, @ 25c.	2 50	
"	23.	3 " " Sims, @ 22½c.	67	
"	"	3 " " Ewell, @ 25c.	75	
"	"	8 " " " "	2 00	
"	30.	pulley, 3" x 10", net	1 85	
			97 16	
Oct.	28.	" am't bro't forward from page 4	139 49	
			236 65	

56 Invoice material, Van Stone mill:

June	22.	Side-lace leather, 21 ft., @ 38c.	7 14	
Sept.	1.	Freight charges	245 55	
Aug.	15.	P. A. Franklin, varnish	30 00	
			282 69	

Invoice of machinery, Van Stone mill:

July	1.	1 4-reel scalping chest, 4' x 26"		180
"	"	1 2- " " " 7' 3" x 26"		150
"	"	1 2- " " " 4' x 26"		120
"	"	2 4- " " " 14" x 32"	1,500	
		Less 30 %	450	
				1,050
"	"	23 elevator heads & boots & pulleys, @ 22.50	317 50	
		Less 30 %	95 25	

July	22.	1 F. M. Williams register		225	25
"	"	" "		15	
"	"	1 corn-cleaner		35	
Oct.	2.	1 American automatic grain-weigher		100	
				1,872	25
May	21.	200 ft. No. 45 link belt, @ 16c.		32	
June	6.	6 #3" set-screws			75
June	19.	800 ft. 4½" 3-ply cot. belt, @ 18c.	144 00		
"	"	600 4" tin cups, @ 11c.	66		
			210 00		
		Less 40 %	84		
				126	
"	"	50 ft. No. 33 link belt, @ 12c.		6	
57 June	19.	1 p'r plate couplings, $1\frac{7}{16}$" x 1½	4 30		
"	"	1 shaft, $1\frac{15}{16}$ x 13' 6"	8 61		
June	19.	2 pulleys, 28" x 8", $8.25	16 50		
"	24.	2 part boxes, $2\frac{7}{16}$, $4.20	8 40		
"	"	1 shaft, 4' x $2\frac{7}{16}$", & coupling	12 50		
"	"	1 clutch-lever corn plate	5		
			55 31		
		Less 40 %	22 12		
				33	19
July	11.	100 ft. link belt, No. 45, @ 16c.		16	
"	27.	41 ft. 20" 5-ply rub. belt, @ 2.85	116 03		
		Less 40 %	46 45		
				69	58
July	18.	64 ft. No. 78 link belt, @ 40c.		25	60
		Total		2,181	37

58 Invoice of labor, Van Stone mill:

		Self:			
Jan'y	16.	About Aug. 6th, 1,200 hours, @ 45c.		540	
		J. K. Shupp:			
Apr.	14.	" Aug. 1st, 1,000 " @ 30c.		300	
		J. K. Bruce:			
Feb.	7.	" Aug. 1st, 1,167 " @ 30c.		350	10
		F. A. Shupp:			
Feb.	28.	" June 16, 862 " @ 30c.		258	60
		W. B. Clark:			
Feb.	19.	" Apr. 18th, 318 " @ 30c.		95	40
		J. R. Sparks:			
Mar.	14.	" May 2nd, 217 " @ 30c.		65	10

W. H. Boman:

Feb.	28.	About June 16th, 850 hours,		@ 30c.	255	

S. E. Ewell:

June	15.	"	July 25th, 350	"	@ 25c.	87 50

J. L. Hern:

May	30.	"	June 20th, 180	"	@ 25c.	45

F. Avery:

May	30.	"	June 20th, 230	"	@ 25c.	57 50

G. W. Dunnica:

Mar.	14.	"	Aug. 1st, 766	"	@ 25c.	191 50

F. W. Woodson:

April	18.	"	May 2nd, 115	"	@ 25c.	28 75

Geo. Rider:

Mar.	21.	"	May 2nd, 286	"	@ 25c.	71 50

Farmer:

June	20.	"	July 11th, 191	"	@ 20c.	38 20

F. Metcalf:

May	20.	"	June 6th, 70	"	@ 20c.	14

Black:

June	20.	"	July 11, 32	"	@ 20c.	6 40

Wm. Zickner:

July	15.	"	July 11, 59	"	@ 20c.	11 80
Aug.	5.	Frank Sommerville, services				20 00
July	15.	Sid. Bruce, machine-work				18 55
Apr.	11.	Sid. Bruce, machine-work				15
May	23.	Chas. Hinton, cartage				11 50
"	"	" " cash				4 75
Aug.	22.	H. Colvert, cartage				21 15
						2,517 30

59 Lumber invoice, Van Stone mill:

Jan'y	8.	1 M B select, @ 3.50	$35	
"	29.	547 ft. C box	21	88
Feb.	25.	544 ft. B select, @ 3.50	19	04
Mar.	3.	508 " " " 3.50	17	27
"	13.	220 ft. D box, @ 2.50	5	50
"	"	12 piece- 2 x 4 x 16 ft. } @ 2.50	4	12
"	"	2 " 4 x 4 x 14 ft. }		
"	"	2 " 4 x 4 x 20 " @ 2.00	1	08
"	10.	4 " 2 x 4 x 16, @ 2.50	1	07
"	10.	10 " 6 x 8 x 12 ft. } @ 2.25	15	84
		4 " 6 x 8 x 14 ft. }		
"	"	12 " 3½ x 10 x 12 @ 2.50	10	50
"	"	10 " 6 x 8 x 16, @ 2.25	17	28

Mar.	10.	4 piece- 8 x 10 x 16 ft. } @ 2.50	15 35		
"	"	2 " 8 x 10 x 14 }			
"	"	2 M 1-in. partition, @ 2.75	55		
"	"	4 M 1-in. A & B select, @ 3.75	150		
"	"	2 M 1-in. flooring, @ 2.40	48		
"	24.	516 ft. 1-in. B select	20 48		
Apr.	5.	440 ft. 1-in. B select, @ $3.50 }			
		360 ft. 1-in. C stock, @ $3.50 }	65 20		
		1,063 ft. 1-in. B select, @ $3.50 }			
May	28.	2 pieces 4 x 6 x 14; 1, 8 x 8 x 14	3 66		
June	18.	1,242 1" B select, @ 3.50	41 87		
				548	04
Am't from sheet No. 6				2,517	30
"		" 7		2,181	37
"		" 8		282	69
				5,429	40
60		To am't forward from sheet # 3		4,097	85
		" " # 5		230	15
		" " # 9		5,429	40
				$9,757	40

1885.

Jan.	16.	To contract price on mill	8,200		
		extra material & labor furnished	230 15		
June	26.	By cash		450	
May	7.	"		550	
"	26.	" p'd Geo. T. Smith		813	75
Aug.	6.	" " "		1,200	
Aug.	6.	" to store		30	37
		Balance due		5,392	53
			$8,436 65	$8,436	65

Less six & $\frac{50}{100}$ dollars, leaving a balance due plaintiff on the whole account of 5,386.03.

61 *C. H. Van Stone to Fred. J. Schupp, Dr.*

To labor and material furnished extra on mill.

Aug.	28.	9 ft. on conveyer complete, 11" x 11", @ $1 p'r ft.		9	00
"	"	To 104 ft. lumber, @ 3½c. p'r ft., net		3	64
"	"	3 gross screws, 1½" x No. 10, @ 40c.		1	20
"	29.	60 hours' services, Bowman, foreman, @ 30c.		18	00
"	"	16 hours' services, Dunnica, @ 25c.		15	00
"	"	30 hours' services, Sims, @ 22½		6	75
Sept.	5.	40 hours' services, Dunnica, @ 25c.		10	00
"	7.	10 " " " 25c.		2	50
"	10.	9 " " Sims, @ 22½c.		2	00
"	11.	6 " " " "		1	35

Sept.	21.	2 pulleys, 4″ x 202, @ 3.70 net	7 40
"	"	1 elevator head, 4″ x 20″, net	6 00
"	"	10 hours' services, Sims, @ 22½	2 25
"	"	10 " " Ewell, @ 25c.	2 50
"	"	10 " " self, @ 45c.	4 50
"	22.	9 " " " "	4 05
"	"	10 " " Sims, @ 22½c.	2 25
"	"	10 " " Ewell, @ 25c.	2 50
"	23.	3 " " Sims, @ 22½c.	67
"	"	3 " " Ewell, @ 25c.	75
"	26.	8 " " " "	2 00
"	30.	1 pulley, 3″ x 10″, net	1 85
			106 16

62 *C. H. Van Stone to Fred. J. Schupp, Dr.*

To extra material furnished and labor performed in excess to that specified in original contract.

March	14.	To laying 2nd floor in mill, 53 hours, @ 25c.	13 25
Apl.	15.	Difference paid Keystone Iron Works Co. on pulleys, 22″ x 48″	3 75
June	18.	10 hours' services changing blasts spout to separator, @ 25c.	2 50
June	19.	10 hours' services changing blasts spout to separator, @ 25c.	2 50
June	20.	10 hours' services changing blasts spout to separator, @ 25c.	2 50
"	"	10 hours' services changing elevator machinery, Bruce, @ 30c.	3 00
June	22.	10 hours' services changing elevator machinery, Bruce	3 00
"	"	12 ft. of shafting, $1\frac{5}{16}$ diam., @ 51c. net	6 12
"	"	2 pulleys, 4½ x 20″, @ 3.12 net	6 24
"	"	2 metal journal boxes, $1\frac{7}{16}$″, @ 1.32 net	2 64
"	"	3 ft. shafting, $1\frac{7}{16}$″ diam., @ 40c. net	1 20
"	"	2 set- collars, $1\frac{7}{16}$″, @ 60c.	1 20
"	"	2 " $1\frac{5}{16}$, @ 85c.	1 70
"	"	1 pair miter wheels, 10″ diam., @ 7c.	2 45
"	"	3 metal journal boxes, $1\frac{5}{16}$, @ 1.80 net	5 40
"	"	1 No. 1 reel-belt tightener, @ $20 net	20 00
	June	22. 2 pulleys, 9″ x 24″, @ 6.12	12.24
63	July	22. To 10 hours' services, self, putting in above,	4 50
	"	22. Sid. Bruce machine, work, bushing pulleys	6 50
July	22.	To 10 hours' services setting corn-sheller	2 50
"	23.	6 hours' services on wheel-spout, @ 30c.	3 00
"	"	10 " " " @ 25c.	2 50
"	"	1 pulley, 3″ x 6″, to drive corn-sheller	1 50
"	"	23 ft. leather belting " " @ 20c. net	3 60

July	30.	10 hours' services making extra screening spouts	2 50
July	31.	10 hours' services in engine-room	2 50
Aug.	17.	4 grate-bars, 50 lbs. each, @ 2c. per #	4 00
"	"	4 sections gas-pipe, 1¼" x 12 ft., @ 5c.	2 40
			123 99
			106 16
			230 15

64 Said answer is in words and figures as follows, to wit:

In the United States Circuit Court, Western Division of Western District of Missouri.

STILLWELL & BIERCE M'F'G Co., Incorporated, Pl'ff,
vs.
CHARLES H. VAN STONE, Def't.

Now comes the defendant and, for its answer to the petition of *defendant* as amended, says in answer to the first count of said petition that he has no knowledge or information sufficient to form a belief as to whether or not the plaintiff is a corporation duly incorporated by the laws of the State of Ohio, as stated in said petition.

Defendant, further answering, admits that about the 16th day of January, 1885, he entered into a contract with one Fred. Schupp, by which said Schupp agreed to build a flouring mill for defendant at the place mentioned in said petition, and admits that the terms and conditions of said contract were substantially as set forth in said petition, except that said contract further provided that in the event any deduction should be made from the contract price to be paid for building said mill that the amount of said reduction should be taken from the amount of the notes provided for in said contract.

But defendant denies that said Schupp fully complied with said contract and built said mill and furnished the machinery therefor as in said contract required, except that he did not complete said mill within the time required by said contract.

And denies that said Schupp completed said mill at any time afterwards, and denies that he ever at any time completed
65 said mill and complied with said contract.

And defendant denies that said Frank Summerville examined and tested said mill, as provided by said contract, and accepted the same on the 16th day of October, 1885, and denies that said mill was then turned over and accepted by defendant, waiving all objections on account of said mill not being completed in time required by said contract.

And defendant denies each and every other allegation of said petition not hereinafter expressly admitted to be true.

Defendant, further answering, states the fact to be that after entering into the contract referred to in the petition the said Schupp

frequently suggested to the defendant that he was desirous of building for defendant such a mill as would be a credit to him, the said Schupp, and would be as an advertisement for him as a millwright, and suggested alterations as to the kinds of machinery to be placed in the same; that the defendant at the time had but little, if any, knowledge as to the construction of a roller mill, and that said Schupp professed to fully know und understand, both theoretically and practically, all about roller mills and their construction and operation, and the defendant, having full confidence in the ability of said Schupp to construct such mill, was willing to allow said Schupp to alter the kind of machinery to be placed in said mill in any way he chose, so that said mill when complete should be *when complete* in no way inferior to the mill provided for by said contract, and should cost defendant no more money than the contract price, and so that said Schupp should be responsible for all such changes; and that there should be no misunderstanding between them as to that matter, plaintiff and defendant agreed in writing, before any machinery had been placed in said mill, that no alteration in
66 said contract should be made unless in writing; that about the — day of August, when both plaintiff and defendant thought said mill complete, they called on Frank Summerville, the person named in their said contract to examine and test said mill, but before the said Summerville did examine and test said mill the said Schupp himself found that that part of said mill intended for grinding corn did not perform as required by said contract, and that for that reason no test was made at that time; but that the said Schupp represented to the defendant that said mill was as to that part intended for grinding wheat complete and fully up to the standard required by the contract, except the aspirator and some other minor parts, which simply needed adjusting, and stated to defendant that he would adjust said mill and make it fully up to the contract, and that it would require but a short time to complete said mill in every way; and that at that time said Schupp requested defendant, not as a matter of right but as a favor to him, to advance to him the sum of $1,200.00, which was not due until the said mill was in every way complete, and as a matter of accommodation to said Schupp he did advance said sum; and that said Schupp also asked defendant to give him a statement to the effect that the part of the mill intended for wheat was satisfactory to him for the purpose of satisfying the creditors of said Schupp that the said mill would be soon complete and thus induce them to be patient with him until he could complete said mill and be entitled to a full payment for the same in the manner provided for in said contract; and that the defendant, having but little information in regard to roller mills and having full confidence in said Schupp, and believing that said Schupp would in a short time complete said mill, and
67 that when complete and put in running order, as said Schupp promised and assured defendant he would do, it would, both as to the parts intended for grinding wheat and the parts intended for grinding corn, be fully equal in every way to the mill required by the contract, and having full confidence in the statements of said

Schupp and relying thereon, did sign and deliver to said Schupp the statement to that effect filed with plaintiff's petition, believing that the statements therein made were substantially true.

That said mill was to be erected in an elevator and mill building which was then owned by defendant, and which was worth, independent of the mill machinery contracted for in said contract with Schupp and exclusive of the value of the land on which the same was located, about $10,000, and that defendant occupied said building and the same was in his possession before and during all the time said Schupp was engaged in work upon said mill, and that after the signing of the instrument of writing filed with plaintiff's petition and referred to as an acceptance defendant occupied said premises as before; that after said writing was made the said Schupp, in pursuance of his promise to put said mill in complete running order, did make some alterations in that part intended for grinding wheat and removed therefrom the "aspirator" and put in place of it a purifier, and then informed defendant that said part of said mill was ready for use, and that defendant did then undertake to run said mill or that part intended for wheat and found that the same did not operate as contracted for; that it failed to comply with said contract in that it did not produce the quality of flour required by said contract, and that it did not produce the quantity of flour in proportion to the quantity of grain that a first-class mill should produce, and that it could not produce the quantity
68 of flour per day of 24 hours required by said contract.

That after the payment of the $1,200.00 aforesaid said Schupp took out a large part of the machinery in that part of the mill designed for corn and put other machinery in its place, but that he did not succeed in making the part of said mill intended for corn comply with said contract, but that the same was of no value for grinding corn.

That after working upon said mill until about the 15th day of October, 1885, the said Frank Summerville, at the request of said Schupp, came to said mill and undertook to run that part of said mill intended for grinding corn, and did run the same for about one hour, and then quit the same; that at the time defendant requested him to test said mill by running it for a day of twenty-four hours in order to test the same, but that the said Summerville did not do so, and that after he had run the same for about one hour both said Summerville and said Schupp were satisfied that said part of said mill did not comply with said contract between said Schupp and defendant.

That if the said Summerville ever at any time decided that said mill, as a mill for grinding wheat and corn, or that the part intended for wheat or that the part intended for grinding corn, was finished in compliance with the contract between said Schupp and defendant, that defendant had no notice or knowledge of that fact, and that if any such decision was ever made it was not fairly and honestly made as contemplated by said contract, but was made by collusion between said Summerville and said Schupp for the fraudulent purpose of cheating and defrauding defendant.

Plaintiff, further answering, says that about the 16th day
69 of October, 1885, the said Schupp abandoned said mill without completing the same according to his contract, and that the said Schupp knew at the time he left said mill that the same was by no means up to his contract, but that said mill, as a mill, was of no value.

That instead of being a mill of a capacity from 50 to 75 barrels of flour per day of 24 hours its full capacity was less than 40 barrels per day of 24 hours.

That instead of producing first-class flour the flour produced by it was far below first class, and that the quantity of flour produced in proportion to the quantity of grain used was not up to the standard of first-class mills, and that said mill did not in any way comply with said contract and did not answer the purposes provided for by said contract.

Defendant, for answer to the second count of said petition, says it is true that Fred. J. Schupp furnished material and did work and labor in and upon a mill building belonging to defendant, but says that he has no knowledge or information sufficient to show what particular material or what particular labor was furnished, and denies that all said items were furnished, as stated in said count, and denies that said material and said labor were of the value stated, and denies that plaintiff is entitled to recover any lien on account of said items, and denies that plaintiff is entitled to any judgment on account of the same.

Defendant, further answering, states the facts to be that such items of said account as were furnished was furnished under a special contract in writing between said Fred. J. Schupp and defendant, of date Jan. 16th, 1885, and mentioned in the first count of the plain-
70 tiff's petition, by and under which said Schupp agreed to build for defendant a flouring mill of a capacity from 50 to 75 barrels of flour per day of 24 hours and from 300 to 400 bushels of corn per day, said mill to produce first-class flour and meal, and to produce as much in proportion to the amount of grain used as the standard of first-class mills.

That said Schupp failed to comply with his part of said contract, and that by reason of his failure defendant was compelled to finish said mill at a cost of $3,000 for other machinery and labor in erecting and adjusting the same, and that he lost the use of his said mill for the space of about twelve months, and that the use of said mill for such time, if said mill had been completed, would have been of the value of $3,000.

Defendant says that the damage he has sustained by reason of the failure of said Schupp to perform his part of said contract has been largely in excess of any benefit defendant derived from said material and labor furnished.

Plaintiff, further answering, denies each and every other allegation of said second count of said petition.

Defendant, in answer to the 3rd count of plaintiff's petition, says that he denies each and every allegation of said count.

And, having fully answered, defendant asks to be dismissed.

C. H. VAN STONE, *Def't*,
P'r BOYD & SEBREE, *Att'ys.*

Said reply is in words and figures as follows, to wit:

71 In the United States Circuit Court for the Western Division of the Western District of Missouri.

STILLWELL & BIERCE M'F'G Co., Incorporated, Plaintiff,
against
CHARLES H. VAN STONE, Defendant.

Now comes the plaintiff and for reply to the answer of defendant denies each and every allegation of new matter therein contained, and, reaffirming the allegations of the petition, asks judgment as therein prayed for.

DAVIS & WINGFIELD,
Att'ys for Plaintiff.

And on said 7th of November, A. D. 1887, the following entry appears of record in said cause, to wit:

STILLWELL & BIERCE MANUFACTURING Co.
against
C. H. VAN STONE. } 1128.

Again come the parties, by their attorneys, and the jury sworn to try this cause, as on Saturday last; thereupon further proceedings are had and the cause is argued by counsel, and, after hearing the charge of the court, the jury retire to consider what verdict they shall render in the premises, and, after due consultation, the jury return into court the following verdict, to wit:

"We, the jury, find the issues for the plaintiff in the first count in the sum of fifty-one hundred fifty-five and $\frac{88}{100}$ dollars ($5,155.88), with seven per cent. interest. Amount of interest, seven hundred forty-three $\frac{97}{100}$ dollars ($743.97). Sum total, fifty-eight hundred ninety-eight and $\frac{85}{100}$ dollars.

"J. C. GATES,
"*Foreman Jury.*"

72 And afterwards, to wit, on Thursday, November 10th, 1887, the following entry appears of record, to wit:

STILLWELL & BIERCE M'F'G Co.
against
C. H. VAN STONE. } 1128.

This day comes defendant and files motion for new trial.

And at the January adjournment of said October term, and on Friday, January 6th, 1888, the following entry appears of record:

STILLWELL & BIERCE M'F'G CO.
against
CHARLES H. VAN STONE. } 1128.

Ordered that the motion for a new trial herein be denied.

Afterwards, to wit, on Saturday, January 7th, A. D. 1888, the following entry appears of record:

STILLWELL & BIERCE M'F'G CO.
against
C. H. VAN STONE. } 1128.

The above-entitled cause having been heretofore submitted and a verdict returned by the jury in favor of the plaintiff for the sum of $5,899.85 *dollars*, to wit, on the seventh day of November, A. D. 1887, the court doth therefore consider and adjudge that the plaintiff, The Stillwell & Bierce Manufacturing Company, recover against the defendant, Charles H. Van Stone, the said sum of five thousand eight hundred ninety-nine and $\frac{85}{100}$ dollars, found to be due by the verdict herein, with interest from the date of said verdict at the rate of 7% per annum, and costs, to be taxed by the clerk.

73 This judgment is to be satisfied within ten days from the entry thereof by the execution and delivery by the said defendant, Van Stone, to the said plaintiff, The Stillwell & Bierce Manufacturing Company, of three promissory notes, two for the sum of two thousand dollars each and the other for the balance of said judgment; one of said notes to be due and payable one year from date, one to be due and payable two years from date, and the other to be payable three years from date, and all to bear interest at the rate of seven per cent. per annum, payable annually; said notes to be secured on real estate to the satisfaction of the said plaintiff.

The court doth further order that if at the expiration of ten days from this date the said defendant has failed or refused and still fails or refuses to execute and deliver to plaintiff the notes provided for herein, then and in that case the foregoing judgment shall be and remain a lien, under the mechanic's lien laws of Missouri, upon the property set forth and described in the first count of the amended petition herein, to wit: Lots numbered (2) two and (3) three, in block numbered (1) one, in Alexander & Sandige's Addition to the city of Marshall, in Saline county, in the State of Missouri, together with mill building situate thereon, and described as in said first count of said petition as follows: Being forty (40) feet by sixty (60) feet in size and about forty-five (45) feet in height above the basement, the elevator-room being on the north side sixteen (16) feet by sixty (60) feet and about forty (40) feet high; also an engine and fuel room attached on the east side; being about fifty-six (56) feet by forty (40) feet and about (18) eighteen feet high, and

74 that said lien date from the 21st day of December, 1885; and if no sufficient property of said defendant be found to satisfy such judgment and costs, then it is ordered that the residue thereof be levied upon the property above described, and so charged with said lien as aforesaid, and that special execution issue therefor.

And afterwards, to wit, on Wednesday, January 11th, 1888, the following entry appears of record:

STILLWELL & BIERCE MANUFACTURING CO.
against
C. H. VAN STONE. } 1128.

This day comes defendant, by Boyd & Sebree, his attorneys, and upon his application the court doth order that the time for filing a bill of exceptions in the above cause be extended to the first Monday in February ensuing.

And on Monday, the 6th day of February, A. D. 1888, the following order was filed and made a part of the record in said cause, to wit:

UNITED STATES OF AMERICA, *sct:*

In the Circuit Court of the United States for the Western Division of the Western District of Missouri. October Term, A. D. 1887.

MONDAY, *February 6th*, 1888.

STILLWELL & BIERCE MANUFACTURING CO.
against
C. H. VAN STONE. } 1128.

This day comes defendant, by his attorneys, before the Honorable Arnold Krekel, judge, at chambers, and presents a bill of exceptions in the above cause, and prays that the same be signed, sealed,
75 and made a part of the record herein, which is accordingly done. Thereupon said defendant presents a writ of error to reverse the judgment rendered in the above cause and a bond in the sum of ten thousand dollars, and said writ is allowed by the judge and said bond is approved, and it is ordered that the same act as a supersedeas of the judgment herein till the said writ shall be considered by the Supreme Court of the United States. A citation to the plaintiff is thereupon signed by the judge.

(Signed) A. KREKEL, *Judge.*

Said bill of exceptions is in words and figures as follows, to wit:

In the United States Circuit Court, Western Division of Western District of Missouri.

STILWELL & BIERCE MANUFACTURING COMPANY, Plaintiff,
vs.
C. H. VAN STONE, Defendant. }

Be it remembered that upon the trial of the above cause, at the October term, 1887, of the above court, the following proceedings were had, to wit:

Testimony.

The witnesses for the plaintiff having been called and sworn in this case, Mr. Boyd, on behalf of defendant, objects to the introduction of any testimony by the plaintiff in this case, for the reason the petition does not state facts sufficient to constitute a cause of action; which objection was by the court overruled; to which ruling defendant at the time duly excepted.

76 FRED. J. SCHUPP, called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. DAVIS:

Q. Tell the jury where you live.
A. I live in Marshall, Saline county, Missouri.
Q. I will ask you, Mr. Schupp, to state to the jury whether or not, on or about the 16th day of January, 1885, you made a contract with Mr. Chas. H. Van Stone, the defendant here.
A. I did.
Q. To build a mill?
A. I did; yes, sir.
Q. I will ask you if you know the signature on that contract there.
A. I do. That is my signature and Mr. Van Stone's.
Q. You saw Mr. Van Stone sign this?
A. I did; yes, sir.

Counsel for plaintiff here offered in evidence the contract just referred to, a copy of which is attached hereto, marked Exhibit —, and made a part hereof.

Said contract is in words and figures as follows:

This contract, made and entered into by and between Fred. J. Schupp, party of the first part, and Charles H. Van Stone, party of the second part, both of the county of Saline, in the State of Missouri, witnesseth: That the said party of the first part, for and in consideration of the money to be paid him and the notes to be executed to him by the party of the second part, as hereinafter stated, agrees to build in the elevator building of the party of the second part, situated in the northwest part of the city of Marshall, in said county, a flouring mill for the manufacture of flour, meal, and breadstuffs.

77 In constructing said mill the party of the first part agrees to furnish all of the material, except such as is now on said premises, and to do all of the work and be at all of the expense. The materials and articles set out and named in the paper hereto attached shall be used in the construction of said mill, and said paper is hereby made a part of this contract. The material used in the construction of said mill shall be good and durable, and the workmanship shall be first class.

The party of the first part shall make all necessary connections between the engine and other machinery, and shall have said mill

complete and ready for delivery to the party of the second part before the first day of August, 1885, and not before the first day of July, 1885.

The capacity of said mill shall be from fifty to seventy-five barrels of flour and from three hundred to four hundred bushels of corn per day of twenty-four hours, and the work of said mill as to the quality of the flour and meal manufactured shall be first class, and the quantity of flour and meal produced by said mill in proportion to the wheat and corn used shall be up to the standard of first-class mills and particularly the Aullville mill of Aullville, Mo., as to quality and quantity of flour and meal produced in proportion to grain used.

When the party of the first part is ready to deliver said mill to the party of the second part upon its completion he shall notify said second party of the fact, and one Frank Sommerville shall be requested to go to said mill and test the same, the party of the first part, at his own expense, putting said mill in operation, the second party furnishing coal and fuel and grain; and the said Sommerville, upon an examination and observation, shall decide whether or not said mill is constructed and operates in accordance with the terms
78 of this contract. If the said Sommerville decides that said mill does operate and is constructed in the manner required by this contract, then said mill shall be delivered to the party of the second part.

But should the said Sommerville decide that said mill is not built or does not operate according to this agreement, he shall, if in his power, inform the said first party of what the deficiency consists, and the said first party shall have fifteen days in which to correct such deficiency, and at the end of such time the said Sommerville shall again examine and test said mill as before, and if he decides that the mill complies with this contract it shall be delivered to said second party; but if he decides that said mill does not comply with this contract he shall make an estimate and ascertain what amount ought to be deducted from the contract price for said mill on account of its failure to comply with this agreement, and said mill shall be delivered to the party of the second part, and the decision made by said Sommerville shall be final upon the parties to this contract.

If the said Sommerville is not within such distance to obtain him for the purpose of making a test of said mill, or if for any reason he fails or refuses to do so, then such person as the parties hereto may agree upon shall make such test and be substituted for him.

The party of the second part agrees to pay said party of the first part for said mill the sum of eight thousand two hundred dollars, as follows:

On the first day of April, 1885, five hundred dollars; on the first day of May, 1885, five hundred dollars; and when said mill is delivered to him, the sum of twelve hundred dollars; and at the time of such delivery execute to the party of the first part his three
79 promissory notes, each for the sum of two thousand dollars, one to mature one year after date, one in two years after date,

and the third in three years after date, all bearing interest from date at the rate of seven per cent. per annum, the interest to be payable annually, said notes to be well secured on real estate and the sufficiency of the security to be determined by Will. H. Wood, Esq., of Marshall, Mo., or, in case he fails to act, J. H. Cordell, of Marshall, Mo.

If there should be a deduction from the price of said mill on account of its failure to comply with this agreement, as aforesaid, the same shall be deducted from the amount of the above notes *pro rata*.

Witness our hands this 16th day of January, 1885.

FRED. J. SCHUPP.
C. H. VAN STONE.

80 One double set latest improved Odell's patent style C rolls — Corrugated — 7″ x 14″
One double set latest improved Odell's patent style C rolls — Corrugated — 7″ x 14″
One double set latest improved Odell's patent style C rolls — Corrugated — 7″ x 16″
One double set latest improved Odell's patent style C rolls — Smooth — 7″ x 16″
One double set latest improved Odell's patent style C rolls — Smooth — 7″ x 18″

One 4 reel Lima bolting chest reels — 12′ x 32″
" 2 " " " — 12′ x 32″
2 4 " scalping " — 4′ x 26″
1 2 " " " — 8′ x 26″

1 No. 3 Geo. T. Smith centrifugal reel.
2 " 1 " purifiers.
1 " 2 Richmond smut machine.
1 " 2 " brush "
1 " 1 " bran-duster.
1 " 0 Eureka magnetic separator.
1 Eureka flour-packer, with 4 tubes.
3 pairs granulating rolls 6″ x 8″ for corn.
18 stands of elevator pulleys 4½″ x 20″;

and the said party of the first part is to furnish all the shafting, journal boxes, couplings, collars, pulleys, wheels, belting, elevator cups and bolts, lumber, hardware, pay all freight and express charges, and do all work required in building the above into a flouring and corn-meal mill, with a daily capacity of from 50 to 75 barrels of flour and from 300 to 400 bushels of corn per day of 24 hours, as follows: Stock hopper ahead of first reduction wheat rolls to
81 have capacity of from 100 to 150 bushels and all the following stock hoppers, 2d break, 3d break, 4th break, 5th break, and 6th break, to hold no less than 4 bushels; build suitable dust-room for the collection of flour dustings from purifiers; all the belting, driving rolls, purifiers, centrifugal reels, and wheat-cleaning machinery to be a good standard leather; elevators to be supplied

with suitable cotton belting and all other belts to be of suitable material for work to be done, and also build receiving sink in basement of mill for corn, and corn stock hopper on second floor of mill suitable for accommodating 100 bushels of corn in each; also put in suitable receiving corn-shaker, with fan attachment, for purifying corn before going on to granulators. The said party of the first part also agrees to make connection of engine to mill-power shaft, and furnish 20 5-ply rubber belt for same; the aforesaid mill to be ready for delivery to the said party of the 2nd part no sooner than the first day of July, 1885, nor later than the 1st day of August, 1885.

For which the said party of the 2nd part agrees to pay eight thousand one hundred and fifty-one dollars and $\frac{25}{100}$ in the manner which we may hereinafter agree upon.

Also to put in the M. F. Kock grain scale and flour register on packer. The above mill is to do as good work up to sample produced by the said party of the 2nd part, using same grade and quality of wheat.

And also suitable bins ahead of packer and retail purposes for retailing flour and meal.

82 Q. Now, I will ask you to look at the statement that is attached to that contract, see when that was made out, and whether Mr Van Stone examined it.

A. I made that out myself, and this was my estimate to Mr. Van Stone and proposition, and we made it a part of the contract.

Q. The agreement you entered into with him was to build according to that contract?

A. Yes, sir.

Q. Was that attached to the contract at the time?

A. No; it was attached to the contract at the time the contract was executed.

Q. At the time it was executed?

A. Yes, sir.

Q. Who had that contract; to whom was it delivered?

A. I don't remember exactly. I think it was to be left in the office of J. H. Cordell, in the bank, for reference between the parties interested. I think that was the understanding, or it might have been the understanding that it remain in the office of Boyd & Sebree.

Q. It don't make any difference about that. I will ask you to look at this account and see if you made that out.

A. Yes, sir; that is a copy of my account, I believe.

Q. Of the account you filed with your petition?

A. Yes, sir.

Q. Look at that paper that is attached to that petition, the one signed by Mr. Van Stone, and see whose signature that is, if you know.

A. That is Mr. Van Stone's signature.

Q. You saw him sign that?

A. I did.

By Mr. DAVIS: I will offer this statement in evidence, signed by C. H. Van Stone.

Said statement is in words and figures as follows:

83 MARSHALL, MO., *Aug.* 6, 1885.

F. J. Schupp, Esq., Marshall.

DEAR SIR: The flour mill put up by you for me is satisfactory to me and is hereby accepted. The corn rolls do not work to my satisfaction. Whenever such rolls are put in as shall do satistory work I shall be ready to pay for the entire work.

C. H. VAN STONE.

84 Q. That is the 6th day of August, Mr. Schupp?

A. Yes, sir.

Q. I will ask you if at that time Mr. Van Stone made an examination of the mill.

A. He did; he was there during the whole construction of the mill superintending and ordering changes. The mill was built according to his superintendency.

Q. How long had you known Charlie Van Stone before this mill was built?

A. I had known him perhaps two years.

Q. What was his business?

A. He was at one time a miller.

Q. Did he have any mill anywhere except this one?

A. He had a mill in Marshall which is now the Saline Roller Mill. He sold out to W. M. Johnson and went into the lumber business, and then he built his mill-house and elevator building in West Marshall, and the year before he got me to put in elevator machinery to handle a thousand bushels of wheat an hour. I put that machinery in for him—that is, he had me put in some of the shafting that would be necessary for a mill in order to drive this elevator machinery. This was the year 1884, I think.

Q. That is another mill you are talking about?

A. No, sir; that was the elevator machinery.

Q. We are talking about this mill.

By Mr. BOYD: We are not objecting to it. Just as well let the jury have a full understanding of the matter.

Q. Go ahead, then.

A. Well, I put in the elevator machinery for him with a view to attach a flouring mill and to make machinery necessary for a flouring-mill purpose, and we got through all satisfactory on that, and in 1884 he came to me the latter part of the month and wanted me to make an estimate for a fifty-barrel mill, full roller. We negotiated for several days and we finally came to an understand-

85 ing on the 16th day of January, I think, 1885, when we made our contract.

By the COURT:

Q. Is that this contract?

A. Yes, sir.

Q. You made a contract that day?

A. We made the contract that day, yes, sir; and proceeded to make arrangements for building the mill. Well, as I had located in Marshall and as I had adopted that as my future place of business, I was rather anxious to build a better mill than my contract called for.

Q. Tell what kind of a mill you did build.

A. I built a roller mill.

Q. Did you build it strictly in accordance with the contract?

A. I did not.

Q. State to the jury in what respect you built it different.

A. I found in order to fulfil my object I could not build as good a mill as I wanted on this contract, and I went to Van Stone and told him that I could not build the kind of a mill I would like to have to represent my business in Marshall according to this contract, and with his permission I would go ahead and spend money in his mill with a view to increasing my own interest, and that I would then advertise his mill in my advertisements and invite millers to Marshall to see this mill and to see the kind of work I do and the kind of mills I build. He said to me, "If you will build the kind of a mill you suggest I will get up in the middle of the night and drive forty miles to do you a good turn to get you a job," and I told him in order to do this I would have to put in six double sets—in this there are five—one double set 7 x 16, one set 7 x 18, one set 7 x 14, making in all 156 inches of roller surface. I told him
86 that by making them all 7 x 14 inches I could build him a better mill. It would be a great deal more expensive to me and give him a larger roller capacity, which it did by twelve inches by using twelve pair of 7 x 14 rolls. It gave him 168 inches instead of 156 inches of roller surface.

Q. You put six rolls in there?

A. I put in those six double sets.

Q. I will ask you whether or not Mr. Van Stone was acquainted with the fact that you had done that?

A. Yes, sir; he knew it. I put them in with his sanction.

Q. Did he mention the length of them?

A. I don't know whether he did or not. I told him the length of them, and I told him they would all be one size.

Q. I will ask you whether you told him before he signed this paper written by Mr. Cordell?

A. I told him before we had ordered the machinery.

Q. After you got the machinery did you tell him after you put it in there before Mr. Cordell wrote this acceptance?

A. When Mr. Misenhelder came there I told him in the presence of Van Stone. He asked me especially about those rolls, and I told him that in preference to using the rolls designated in the contract we had decided to put in twelve pairs of rolls instead of ten pair

and make them all of one size. That was about the 22nd of July, when the mill was ready for operation; what we call a complete mill is one already to start.

Q. Now, tell the jury when it was that the flour part of this mill was accepted by Mr. Van Stone; whether this paper is of the right date.

A. It was accepted by Mr. Van Stone on the 6th day of August, 1885.

Q. When did you complete, if you ever did complete, the corn rolls?

87 A. I think the corn rolls were completed about the 10th day of October.

Q. Who examined that?

A. Frank Sommerville.

Q. Is he the same Frank Sommerville mentioned in this contract?

A. The same.

Q. What is his business?

A. He is a miller.

Q. Who did he work for?

A. At that time?

Q. Who did he work for before that time? Did he ever work for Van Stone?

A. He had worked for Van Stone, I think, but I could not swear to that.

Q. He was a miller, was he?

A. He was a miller.

Q. Was he a competent miller?

A. He was a competent miller; yes, sir.

Q. He is here now?

A. He is here now. He had run a mill for Hayden Brothers and Co.; a full roller mill.

Q. Who suggested, when you made this contract between you and Van Stone, Frank Sommerville as the man to accept this mill?

A. Mr. Van Stone.

Q. Do you know his signature when you see it?

A. I do.

Q. I will ask you to look at this paper. (Witness here handed a paper by counsel.)

A. That is Mr. Sommerville's signature.

Q. Who signed that paper?

A. Mr. Chas. H. Van Stone.

Q. Now look and see who signed this. (Witness here shown paper.)

A. That is my own.

Q. All these papers you have read and signed and know what is in them; they refer to this particular mill?

A. Yes, sir; I have seen them.

Q. The mill you built for Mr. Van Stone?

A. Yes, sir.

88 Counsel for plaintiff here offers in evidence the acceptance by Frank Sommerville of the machinery in controversy in this action, which paper was in words and figures following, to wit:

"MARSHALL, SALINE COUNTY, MISSOURI, *October* 16, 1885.

Messrs. Schupp and C. H. Van Stone:

The corn rolls and adjustments to same operated and tested by me on the 15th day of October, 1885, is entirely satisfactory to me, and I hereby accept it according to your contract.

FRANK SOMMERVILLE."

"The flour mill also which was built by the above Fred. J. Schupp for the above C. H. Van Stone, which was tested by me about August 6, was also entirely satisfactory to me.

FRANK SOMMERVILLE."

Counsel for plaintiff here offers in evidence the following letter, to wit:

Letter to Still. & Bierce.

"GENTS: I have this day received the mill contracted by F. J. Schupp with me, excepting the corn-mill part of the mill, and have agreed to make settlement with J. H. Cordell for him when that part of the mill, meaning the corn-mill part, is made satisfactory.

Your Mr. Misenhelder gave entire satisfaction, and, I think, did all any man could do under the circumstances.

Truly yours, C. H. VAN STONE."

Counsel for plaintiff here offers in evidence the assignment of Schupp to plaintiff, dated December 21, 1885, of which the following is a copy, to wit:

88½ MARSHALL, SALINE COUNTY, MO., *Dec.* 21*st*, 1885.

For value received, I hereby assign, transfer, and set over to Stilwell & Bierce M'f'g Co. of Dayton, Ohio, all my accounts against Charles H. Van Stone for machinery and material furnished and for work and labor done in fitting up the mill of said Van Stone in Marshall, Saline Co., Mo., for the balance due on said contract, amounting now to $5,392.53, and also my mechanic's lien on said mill, which said mechanic's lien was filed on December 21st, 1885, hereby authorizing said Stilwell & Bierce M'f'g Co. to enforce said lien and collect said account according to law.

Witness my hand the date above written.

FRED. J. SCHUPP.

Attest: JAS. WINGFIELD.

89 Q. You signed that, Mr Schupp?

A. Yes, sir.

Q. What consideration was it for?

A. I was indebted to the house for the entire bill, and I had no money to fight the case, and I considered that I owed them as much protection as was in my power to save themselves. I wrote them

that if they would pay the law expenses I would assign the whole thing to them, as I was not able to do so.

Q. Had you any means?

A. I had nothing. I was completely busted on account of disappointments I had met with. I had nothing but my reputation.

Q. Did you owe Stillwell & Bierce?

A. I did; yes, sir; I owed them the account.

Q. Didn't you owe more than that?

A. I don't know. I think I owed them about that amount.

Q. You have examined these accounts, Mr. Schupp; you may state generally whether it is correct or not.

A. Yes, sir; it is correct.

Q. Did everything in that account go into that mill?

A. It was in the mill.

Q. In this particular mill?

A. In this particular mill; it was not in at the time my lien was filed, as some had been taken out, but it went in and was in at the time the mill was accepted, excepting one item, an automatic grain-weigher for weighing grain.

Q. When did that go in?

A. I cannot tell the exact date.

Q. It was before you filed this lien?

A. Yes, sir; it went in there before I filed the lien; it went in there before I received the second line of corn machinery, and when I got through with the corn machinery the mill was com-
90 plete and everything in at that date—everything that is specified here. The reason that the grain-weigher was not put in sooner I had contracted——

Q. You need not mind telling the reasons. I want to know if everything in that account went in that mill?

A. They did; yes, sir.

Q. And you owed Stillwell & Bierce when you transferred this account to them more than the amount of that?

A. I don't know the exact amount. I know I owed them the full amount.

Q. You know Mr. Van Stone was the owner of that mill?

A. I did; yes, sir.

Q. There has been no payments made since you made this assignment to Stillwell & Bierce?

A. Well, nothing only the payments he is credited for; there were no payments made since then.

Q. Mr. Schupp, what is your business?

A. I am a mill builder and furnisher.

Q. How long have you been at it?

A. I have been in business myself since 1882.

Q. How long have you been working at that business?

A. I could not tell exactly. I used to hold a candle for my father when I was too small to work.

Q. In that same business?

A. Yes, sir.

Q. Your father was in the business?

A. Yes, sir.

Q. You can tell the jury, if you please, what kind of a mill it was you built for Charlie Van Stone.

A. I built him as good a mill as there was in the State of Missouri at that date in every respect; it did as good work as any mill in Missouri.

Q. You saw it tested, did you?

A. I did; yes, sir.

91 Q. Did you see Mr. Misenhelder there?

A. Yes, sir.

Q. What did Mr. Misenhelder do?

A. Well, he first asked a description of the mill, which of course was due him, as he was a new man dropped right into a mill that he did not know anything about. I described the machinery to him and he then started the mill and he ran it, I think, for about ten or twelve days; I think he started the mill on the 23rd of July, I am not positively sure of that date; between the 22nd and 25th of July, 1885, he started the mill and he ran it constantly up to and including a half of the 6th of August, 1885.

Q. Were you present when this letter was written about Mr. Misenhelder?

A. No, sir; I didn't know anything about the existence of that letter.

Q. August 6th?

A. Yes, sir.

Q. That is the time you say he stopped?

A. That is the time he stopped, yes, sir; he left Marshall on the night of that day.

Q. He is here?

A. He is; yes, sir.

Q. Now, I want to ask you this question: I want to ask you what the machinery that you put in that mill was worth—reasonably worth?

Defendant object- to this question, which objection was by the court overruled.

Q. Go on and state whether it was reasonably worth the amount charged in this petition.

A. The mill cost me about two thousand dollars more than the contract.

92 Q. What was it worth?

A. It was worth more than ten thousand dollars when completed.

Q. What is the machinery worth that the company is using, was it worth the amount charged in the petition?

A. It was not.

Q. The machinery you put in there, was it worth the amount charged in our petition?

A. Oh, yes; it was worth more than that. I was thinking of the machinery furnished by them.

Q. Now take the account you have there, and were those prices reasonable?

A. They were; yes, sir. They were a little better than were being done by other houses at that time.

Q. You got that machinery from Stillwell & Bierce?

A. I did; oh, some part of it that I did not I manufactured myself, at Marshall; then I got considerable from the Keystone Iron Works Company here—that is, belts, shafts, castings, etc.

Q. Well, the contract calls for certain kinds of rolls; now, I want you to state to the jury whether or not the rolls you did put in were better than the rolls you contracted for.

A. They were not better; they were of the same machine, only the mill erected as we erected it was a much better mill than it would have been according to the contract.

Q. The rolls, how about that?

A. The rolls were the same, only that instead of being different sized they were all one size.

93 Q. How about the bolting chest?

A. Well, sir, I had contracted to put in a Lima bolting chest, but defendant told me one day after the contract was made that if I could get up a bolting chest so as to have the conveyers side and side he would much prefer it, and I built a chest in Marshall, and retained the money in Marshall for our home labor in preference to going to foreign States for our other machinery. I told him I had invented a cut-off—that is, the conveyer system of bolting chests—and that if it suited him I would make a model and show him exactly what the thing would be, which I did, and from this model he ordered me to make my chest in preference to ordering the Lima chest. The contract specifies the Lima bolting chest; instead of that he has got a Marshall bolting chest.

Q. Which is the best chest?

A. My chest; of course, I think so.

Q. I will ask you this question: Whether it was an advantage or a disadvantage to Van Stone to have these rolls put in with the larger amount of surface or to have the other rolls you contracted to put in?

A. That was an advantage.

Q. On account of the surface?

A. Yes, sir; and more separation. It was a disadvantage to myself. It cost me a great deal of extra machinery to put them in that way. I had to have bigger wheels, extra elevators, and extra spouting and extra bolts to drive an extra shaft.

Q. Now, there is a charge in the petition in your mechanic's lien for extra work. Now, tell the jury what that extra work consisted of, and when it was done, and all about it.

A. There was a great deal of work done during the con-
94 struction of the mill that was not under my contract, such as changing the elevator machinery that was used for handling grain, changing the drive wheel. I put in an extra shaft and extra drive, so that it could be shut off.

By Mr. BOYD: We object to this testimony on the ground that the petition alleges that this work was not done about the elevator, but about this particular mill.

Mr. DAVIS: We are talking about the extra work on the mill.

Q. Was it on the mill or the elevator?

A. A portion of it was; yes, sir; on the mill.

Q. I want that part that was on the mill then.

A. Well, one part was this: Van Stone, after he had accepted the mill——

By the COURT: The question here is, Mr. Schupp, how much of that is for the mill and how much for the elevator?

A. Well, I can't get at that exactly. I did not keep an item of near all the extra work I should have charged for.

Q. You can tell the jury from that account.

By Mr. BOYD: We object to this evidence on another ground, and that is that the parties themselves have introduced the contract between these parties, and that contract directly specifies that the defendant, for the consideration named in the contract, shall do all work that is necessary about the mill.

By the COURT: That contract is the rule, unless any portion of the contract has been satisfactorily arranged.

Q. If you can point out what the extra work is point it out.

A. Well, here is one item that was charged up to Mr. Van Stone: The understanding was that he was to pay half and I was to pay half; that was about writing the contract.

Q. Never mind about that.

95 A. Well, then there was also a bill for laying a second floor in the mill.

Q. How much was that?

A. $13.75; he could not get carpenters and I did that for him with my men. Then there was a freight bill of four dollars that I paid that was not in my bill.

Q. What was it on?

A. It was a Lima heater and filter combined.

Q. What was that for—for the mill?

A. It was for the engine-room—for driving the whole thing.

Q. The engine drives the elevator?

A. The mill and elevator also.

Q. What was it used for, the mill or elevator?

A. It was used for clarifying the water and heating it before going into the boiler.

By the COURT: That is not in the contract. We will pass that. Let him look at that account and make it up and state it afterward. Pass on and he can be called back.

Cross-examination by Mr. BOYD:

Q. Mr. Schupp, at what time did you and Mr. Van Stone commence negotiations in regard to the building of this mill?

A. I think it was the extreme latter part of December, 1884.

Q. How long were you in arriving at what your contract would be?

A. Well, I was not very long. I made him several propositions during that period.

Q. I will ask you now that if the bill of machinery that is attached to that contract was not a matter that was talked about between you and Van Stone with reference first to the character of the machinery and then of the quantity and what was necessary to put in the mill and the kind that Mr. Van Stone desired you to build, and if that bill was not agreed upon as the machinery,
96 the character of machinery, and the quantity that was necessary to build the mill that you contemplated?

A. I don't know that we talked very particularly on it. I just made him an estimate on that line of machinery. He considered it, and the same day that I offered him this proposition he made the contract.

Q. Had he anything to say in regard to the character of the machinery that was to be put in there?

A. He did; yes, sir.

Q. And in response to that that itemized bill was made out, wasn't it?

A. No, sir; this itemized bill was made out before I saw Van Stone.

Q. Made before you saw him at all?

A. Yes, sir; that is, I showed him this bill afterwards as my estimate.

Q. But you did not show it to him before you and he talked about what machinery he wanted in the mill?

A. Well, he wanted a mill to make fifty barrels of flour a day.

Q. I understand that, but did you talk about that particular machinery mentioned in that contract?

A. No, I think not.

Q. Did you show him that bill?

A. Yes, sir.

Q. Did he ask you anything about the particular kind of machinery that he proposed to use, the size of the rolls, the character of the other machinery there? Well, now I will go back first to the rollers; you first specify one double set Odell's patent style
97 C roll, 7 x 14?

A. Yes, sir.

Q. Did you put that kind of a roller in the mill?

A. I did; yes, sir.

Q. Of that size?

A. Yes, sir; that size.

Q. Then a second item of the same kind, 7 x 14. Did you put that in the mill?

A. Yes, sir.

Q. And then another of the same character, 7 x 16. Did you put that in?

A. I put in the same kind—not the size.

Q. What was the difference in size?

A. Two inches in length.
Q. Was it longer or shorter?
A. Longer.
Q. 7 x 18, then?
A. No, sir; 7 x 16.
Q. That called for 7 x 16. You say they were two inches longer?
A. It was two inches longer than the other machinery.
Q. Then it was 7 x 18 or 7 x 16?
A. No; the first one you mentioned was 7 x 14, the second 7 x 16—that was 7 inches in diameter and 16 inches long—and the other was 7 in diameter and 14 inches long.
Q. Then it was two inches shorter?
A. Yes.
Q. Mr. Schupp, after that acceptance of August 6 was written by Mr. Van Stone, I will ask you if you did any other work about the wheat-grinding apparatus of that mill?

Counsel for plaintiff objects to this question, which objection was by the court overruled.

A. I would have to go into the history of a long conversation on that question. Our mill was complete on the 6th day of August, and accepted on that day.

98 Q. Mr. Schupp, just answer my question. I will ask you, now, this question: If any part of the machinery called for in the original contract between Van Stone and yourself—that is, so far as the wheat-grinding part was concerned—was put into that mill after the 6th day of August? I will ask you if any part of that machinery was put into the mill after the 6th of August?
A. Nothing but an automatic grain-weigher.
Q. Did you have a separator in the mill?
A. Yes, sir.
Q. I will ask you what became of it?
A. I don't know.
Q. I will ask you if you did not remove it before you left the mill and before you turned it over?
A. I did not.
Q. I will ask you if, after the acceptance of this mill that you refer to, you ordered a purifier of George T. Smith & Co.?

By the COURT: How much more of that is there?
By Mr. BOYD: Notwithstanding that might have been an acceptance at the time these parties had the right to waive that acceptance.
By the COURT: Go on, then.

Q. Now, I will ask you whether you ordered from George T. Smith and Company——

Plaintiff objects to the question, which objection is by the court sustained.

Q. Did you and Van Stone agree to take that separator out and agree to put in a purifier in place of it?
A. No, sir.

Q. Did you order a purifier?

A. I ordered a purifier as George T. Smith & Co.'s agent at Marshall. He came to me and ordered the machine, and, as I was acting as their agent on commission, I ordered this machine for him.

Q. Didn't you order that machine precisely as you had
99 ordered the other machinery that wen tinto the mill?

Plaintiff objects to the question; which objection was by the court sustained.

Q. Was there any agreement between you and Van Stone that the separator should be taken out by you and the purifier put in the place of it?

A. Counsel for plaintiff objects; which objection was by the court sustained.

Q. I will ask you, at the time of the acceptance of this contract that you spoke of, on the 6th of August, if Mr. Van Stone was advised of the fact that you had put in different rollers from the rollers that had been contracted for.

A. No, sir; he knew it all the time. He knew it before the rolls were ordered. He knew he was getting six double sets, ten pair of 7 x 14 instead of ten pair, specifying four pair 7 x 16 and two pair 7 x 18.

Q. I will ask you if in March, before the machinery had been put into the mill, if you did not ask Mr. Van Stone to agree with you that a different character of machinery might be put into that mill, and if he made any objection to it.

A. He spoke to me just before I ordered this machinery, so it would be satisfactory, and he consented to have me put it in if I would do it at my own expense; put in six double sets of rolls instead of five, as designated by the contract, and using all of one size, 7 x 14, the smaller size designated in the contract; and on the strength of his reputation I ordered them and built my bolting chest, and after I got the machinery on the road, the bolting chest erected, and the elevator up, and I saw your partner and told
100 him we had made many changes in the contract, and he said, "You go right to Van Stone and get him in writing on that." That was Sebree told me this, and I went to Van Stone, and he told me, "What is the use? The court would not let me out."

Q. Look at this paper. Is that your signature?

A. Yes, sir; it is.

Q. Well, I will ask you if that does not provide——

A. The machinery was ordered and the work far advanced before this paper was signed.

And thereupon counsel for defendant read in evidence a paper in words and figures following, to wit, dated March 14, 1885:

"It is hereby agreed that all payments and settlements made by and under this contract, enclosed herewith, made by and between C. H. Van Stone and Fred. J. Schupp and dated January 16, 1885, shall be made to and with J. H. Cordell by said C. H. Van Stone,

and no alterations of said contract shall be made unless in writing, signed by the parties.

(Signed) FRED. J. SCHUPP.
C. H. VAN STONE."

Q. Mr. Schupp, you knew what that contract was when it was written and you signed it? You knew at that time these alterations had been made?

A. Yes, sir.

Q. Why didn't you specify them in that contract?

A. I did not think it was necessary. I thought I was dealing with a man who would appreciate what I was trying to do.

Q. Mr. Schupp, at the time this examination was made of the mill, on August 6th, and the acceptance that you spoke of
101 made, will you state to the court how that acceptance happened to be made that day and why it was made?

A. I will. Sommerville had been there and thoroughly tested the mill. He came to me and said, "Fred, the mill is all right, I don't see what more you can do to improve it now; you go to Van Stone and ask him to accept it, and if he don't accept the mill I am ready to accept it;" and I went to Mr. Van Stone and in the presence of Sommerville I asked him to go uptown with me and make the final settlement, that the mill was all right and as good as we could make it at that time. He said, "I am ready," and he got his coat and went uptown with me, and he paid Mr. Cordell twelve hundred dollars, the final cash payment; and I asked him then for a letter of acceptance in the presence of Mr. Cordell, the only time I ever asked him for a letter of acceptance. He said, "You write anything you can write, you can't get it too strong. I am willing to write anything." He said, "No, it would look better to have Cordell write it;" and he turned to Mr. Cordell and said, "You are used to writing these things;" and he wrote it and he took it and re-read it and signed it and handed it to me and I left the bank.

Q. Now, at that time you say the mill was in complete condition?

A. It was; yes, sir; the flour-mill part.

Q. How was the corn roll?

A. The corn roll did not work to my satisfaction; I had condemned them myself.

Q. Did they work to Sommerville's satisfaction?

A. They did not; I reported to Mr. Van Stone that the corn rolls would not do.

Q. And do you tell the jury that Mr. Sommerville, notwithstanding the corn rolls did not work to your satisfaction or to his satis-
102 faction, that he was willing to accept it?

A. He was willing to accept the flour part.

Q. You only had reference to the flour part?

A. Yes, sir.

Q. Now, Mr. Schupp, what payments did Mr. Van Stone make to you under this contract?

Counsel for plaintiff objects to this question because the pleadings

in the case show what payments have been made, which objection was by the court overruled.

Q. Well, in January he paid me four hundred and fifty dollars he gave me a note he held on some party and I had to discount it.

Q. That was the first payment that was specified, was it?

A. That was the first payment specified to be paid the first of April.

Q. Did he pay you the money?

A. He paid me four hundred and fifty dollars.

Q. Now, in April what amount of money did he pay you?

A. He did not pay any.

Q. In May?

A. I don't know. In April he transferred the payment to Mr. Cordell and I borrowed the money of Mr. Cordell.

COUNSEL FOR PLAINTIFF: There is no claim in the answer that there is any payment made except what we set out in our petition.

By the COURT: There is a general denial, and that covers everything.

Q. What payment did he make to you, either in April, May, or June? What was the second payment he made?

A. The second payment was $550, which he made to Mr. Cordell.

Q. His contract was to pay you five hundred dollars at one payment, five hundred at another payment, and that was all the money that was to be paid before the completion of the mill?

103 A. Yes, sir.

Q. What amount of money was to be paid when the mill was completed?

A. Twelve hundred dollars.

Q. Did he make these three payments?

A. Yes, sir.

Q. I will ask you if he made a payment in addition to that?

A. He did not.

Q. You credit him with eight hundred and some odd dollars?

A. That was for a purifier and some wheels I ordered from Jackson, Michigan. He issued his notes for that machinery and I credited him with $813.75 to be deducted from the first note falling due one year from date.

Q. To be deducted from the first note?

A. Yes, sir.

Q. Then he paid you up to the time that he accepted the mill every dollar that he had agreed to pay you in cash?

A. No, sir.

Q. Does not your contract call simply for three payments, one of five hundred dollars in April, one of five hundred in May, and one of twelve hundred dollars when the mill was complete?

A. Yes, sir.

Q. Didn't he make you all of these payments?

A. He did; yes, sir.

Q. And, in addition to that, didn't he pay the $815 to the Smith Purifying Company for you?

A. He did not pay it until one year from date.
Q. He has paid it?
A. I don't know.
Q. He released you from the Smith Purifying Company?
A. He did; yes, sir.
Q. So it was a payment so far as you were concerned. I will ask you if you did not accept that as a payment of that much
104 money to you.
A. Yes, sir.
Q. You say you finished this mill, corn rolls and everything else, on the 16th day of October?
A. No, I did not. I had the mill all completed about the 20th of July, ready for starting on the 20th of July, 1885, and these contingencies came up after we started the mill and I found the corn rolls would not do, and I condemned them, and I told Mr. Van Stone, as the corn rolls were not working for my satisfaction, I would throw them out and order them a new one. He said, "You haven't given it a fair trial." I said, "I have; you can't stand disappointment in your purchases of corn, and I can put in a bur I have temporarily at my own expense, to run here as a substitute for other rolls until I can get them. I put the corn bur right in and started and left it in there until I got the other rolls ready.
Q. When did you get them ready?
A. I think I got them ready about the 20th of September.
Q. When were they tested by Mr. Sommerville?
A. The 15th of October.
Q. And that day you turned them over to Van Stone. Now, I want to ask you on the 15th day of October, when you turned that mill over to Van Stone, what amount of money was due you under that contract in cash?

Counsel for plaintiff objects to this question, as the contract itself is the best evidence, which objection was by the court sustained.

Q. Mr. Schupp, I will ask you, *if* at the time you tested these corn rolls on the 15th day of October, what test was made by Mr. Sommerville?
105 By the COURT: I will exclude that, as there is an acceptance as to that.
Q. Mr. Schupp, at the time Mr. Sommerville made the examination of that mill I will ask you if it was not agreed between you and Mr. Van Stone both that the corn rolls did not work to the satisfaction of anybody?
A. It was not.
Q. And if you did not state so to divers parties?
A. No, sir; I did not. The corn rolls did as good work as any corn rolls could do at that time. They were fully up to any other machine of that kind.
Q. Mr. Schupp, I will ask you if, when this mill was complete, if you demanded anything of Mr. Van Stone; and, if so, what?
A. I demanded a settlement according to the contract; presented my bill.

Q. What did you present your bill for—how much money?

A. I presented it for what was due me on the contract and for sending my men there and reconstructing the mill.

Q. What was the amount of the demand you made upon him?

A. I don't remember exactly.

Q. Wasn't it the amount of this bill set out here, fifty-three hundred and some odd dollars?

A. Yes, sir; that was the amount.

Q. How much money at that time did you owe Stillwell & Bierce?

A. I don't know exactly.

Counsel for plaintiff objects to this question, as there is nothing of that kind set up in the answer, which objection was by the court overruled.

Q. How much money, at the time of this assignment, did you owe Stillwell & Bierce?

106 A. I don't know; it was in the neighborhood of fifty two or three hundred dollars.

Q. Have you any account of the amount you did owe them?

A. I have not.

Q, I will ask you if there was any agreement between Stillwell & Bierce and yourself that you were to have the excess, if any was recovered in this suit, over your account to them?

A. I was not.

Q. And you actually owed them the full sum of $5,300 when you made this assignment of the contract?

A. I don't know exactly what the amount was that I did owe them. I assigned my full claim, for what there was due, over to them and what I owe them I don't know to this day exactly.

Q. Did you owe them as much as five thousand dollars?

A. I did owe them more than five thousand dollars.

Q. Did they ever present an account of it?

A. I had bills of it, but a year ago last summer, when my wife was in West Virginia, the house was vacant and the mice got in and destroyed all the bills and letters I had, so I have no account of it whatever, but I am certain it exceeded five thousand dollars.

Q. You had a contract with Stillwell & Bierce to furnish you the machinery to put in this mill?

A. I had nothing further than a verbal understanding. I was acting as their agent.

Q. At that time, I will ask you if you showed them the contract between Van Stone and yourself?

A. I did; yes, sir.

Q. They understood fully what was in the contract; they read it, did they?

A. I don't know. I suppose they did.

107 Q. All you asked of Van Stone or demanded of him at the time the mill was complete was a settlement under the contract?

A. A settlement under the contract, including the extra bill I was entitled to.

Q. I will ask you if, at that time or shortly after that, Mr. Van Stone offered you any notes of any kind whatever?

A. He never did; no, sir.

Q. You knew your agreement was to be settled at the bank of Cordell & Dunnica?

A. I did; yes, sir.

Q. I will ask you if you ever saw that instrument?

(Witness here shown a paper.)

A. I don't think I ever did.

Q. Look at it and see whether you ever saw it.

A. No, sir; I never saw it. Mr. Cordell showed it to me in this way.

By the COURT: What paper is it?

A. A deed of trust. Mr. Cordell told me there were notes left there for thirty days for my acceptance, and I told him I would not accept it.

Q. Now, I will ask you if you ever saw the notes?

A. I never saw them. I told Mr. Cordell I need not look at them. I would not accept them.

By the COURT: Was it the amount you claimed to be due you?

A. No, sir; not by several hundred dollars. This was merely a form of compromise that was offered me and I refused to accept it; if they come with the amount of the contract I will accept it.

Q. I will ask you if, at that time, Mr. Van Stone and yourself undertook to have any settlement of this matter between you—did you go to him for a settlement?

A. We used to run to one another quite often.

108 Q. Did you come to any sort of agreement about amounts?

A. One time he wanted me to pay him $800 to get those notes, and I offered to split the difference.

Q. Now, I will ask you if, at the time you finished that mill, you were indebted to any parties for work and machinery?

Counsel for plaintiff objects to this question, for the reason that it is inadmissible under the pleadings in this case.

By the COURT: Did any one of your laborers or any one that furnished you material file any liens?

A. No, sir.

Q. Now, Mr. Shupp, at the time those notes were offered to you I will ask you if this instrument of writing was shown to you?

(Witness here shown another paper.)

A. I saw it in the hands of Mr. Cordell. I never looked at it.

By the COURT:

Q. Did he tell you the contents of it?

A. He told me Mr. Van Stone had left three notes there for my acceptance as a proposition for a compromise and I refused to accept his compromise; it was not a settlement of the contract, it was a compromise.

Counsel for plaintiff objects to this testimony, as there is no tender pleaded in this case.

By Mr. BOYD: At the time that this settlement was attempted these parties did not agree as to the amounts.

By the COURT: Let the offer be excluded.

Q. Mr. Schupp, when you filed your account with the clerk of the circuit court of Saline county I understood you in your examination-in-chief to say that you copied the items in the contract yourself, did you?

A. No, sir.

Q. That is, then, different from the items named in the account?

109 A. Yes, sir; that is, some are different and some are the same.

Q. Are the prices named there the same prices of the articles in the contract itself?

A. I don't understand that question.

Q. Are the prices you charge in the lien filed the prices of the articles named in the contract?

A. They are consistent with the machinery, but the prices are different, of course—that is, 9 x 18 rolls. A double set costs, perhaps, fifty dollars more than a set 9 x 14.

By the COURT:

Q. I understood you to say that you bore the extra cost in changing the length of the rollers?

A. Yes, sir.

By the COURT:

Q. How do you charge them—according to the contract or according to the prices you paid for the material in this account?

A. In our bill we simply claim a settlement according to the contract, but the bill was made out according to the way the mill was erected.

Q. So that instead of you losing it you charge it up in this claim in the court?

A. I charge according to the contract, but the machinery bill is more.

By the COURT:

Q. So that the bill you filed in the clerk's office you charge according to the contract?

A. According to the contract.

Q. And you lost the balance?

A. Certainly; I lost the balance out of my own pocket.

Q. Was the machinery you put in more expensive or less expensive than that called for in the contract?

110 A. The rolls—there were three double sets of rolls—two double sets, I think, would cost twenty-five dollars more a set than 7 x 14, and one cost perhaps fifty dollars more than 7 x 14; in-

stead of that I put in an extra double set of rolls, which cost me somewhere in the neighborhood of four hundred dollars.

Q. In addition to what was in your contract?

A. In addition to what was in my contract, and I would have saved on these rolls about one hundred dollars—that is, if I had put in five double sets of 7 x 14 they would have cost me perhaps one hundred dollars less than that—sixty dollars less than that for two double sets 7 x 14, two double sets 7 x 16, and one double set 7 x 18; in addition to these five double sets I put in the full machinery for that capacity extra, costing me nearly four hundred dollars more, I suppose, at that time than the contract.

Q. Did you charge that item up in the lien?

A. I did not, as it is specified, but it is not charged in that way; we are simply claiming a settlement under our contract.

Q. Is there any charge for that machine in your lien at all?

A. No, sir; nothing of that kind. Then besides these rolls it required two elevators worth about sixty-five dollars apiece; it required two reels worth about one hundred dollars, and it required two bolting reels extra to accommodate those two sets of rolls; so you can imagine the cost it put me to, and it made him a mill of twelve reductions in place of ten reductions and — twelve-reduction mill is always preferable to a ten-reduction mill.

By the COURT:

Q. It was done with his knowledge and consent?

A. It was done with his knowledge and consent; yes, sir.

Q. At the time you went to work here did Mr. Van Stone know anything about roller mills at all?

A. I doubt very much whether he did or not.

111 Q. And he relied upon you entirely, upon you and your knowledge of matters of that kind exclusively, did he?

A. I suppose he did; yes, sir.

Q. Now, when these changes were made, I will ask you if that contract you read awhile ago signed by you and he was not made with special reference to such changes?

A. I did not understand it so at the time. I was not up to tricks; I was doing an honest business.

Q. I will ask you at that time if there was not considerable talk between you as to whether you should put in a Lima bolting chest or one of your own?

A. No, sir. He said, "I prefer you should make a chest. I think you can build just as good a chest as anybody." I made a model and showed it to him, and from that he ordered me to make the chest in preference to ordering one from Lima.

Q. What was the reason, then, for writing that contract that there should be no changes in the mill?

A. The changes were all made prior to writing. I commenced building the chest in January and that paper is dated the 14th of March, and I commenced to build the chest in the shop right after the signing of the contract. That paper was merely slipped in on me when I was off my guard.

Redirect examination:

Q. The contract that Mr. Boyd has just asked you about as to the reason for executing it, I will ask you whether or not that suggestion of putting it into writing was made to you by Mr. Boyd or his partner, Mr. Sebree?

A. Mr. Boyd wrote that himself.

112 Q. Now, Mr. Schupp, I will get you to state if when that flour mill was tested and accepted in August 6 you were present and saw the operation?

A. I did; I was present all the time.

Q. And you know what the capacity named in the contract was?

A. Yes, sir.

Q. State to the jury whether the flouring part of the mill at that time had a capacity to produce the flour named in the contract.

A. It had a much greater capacity. Its capacity was eighty barrels a day easy.

Q. And when the corn mill part of it was tested and accepted October 16, 1885, did it have the capacity named in the contract for the corn mill?

A. Yes, sir. It was satisfactory to Van Stone at that time, which we will prove.

By Mr. BOYD: Do I understand your honor to hold that the acceptance by Sommerville was binding upon both these parties—whether the mill came up to that, they were bound by it?

By the COURT: I think so.

Witness dismissed.

FRANK SUMMERVILLE, called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

Q. Mr. Summerville, tell the jury where you resided in October, 1885. Did you live in Marshall?

A. Yes, sir.

Q. Look at that paper and see if you signed it.

(Witness here shown acceptance heretofore referred to.)

A. Yes, sir.

Q. What is your business?

A. Miller.

Q. How long have you been in that business?

A. Ever since I was a boy.

113 Q. I will ask you if you are familiar with the machinery of this Van Stone mill. You have read this paper?

A. Yes, sir.

Q. I will ask if you made an examination of it.

A. I did.

Q. And made this report?

A. Yes, sir.

Cross-examination:

Q. State what examination you did make, Mr. Sommerville.
A. I made a thorough examination.
Q. Just state what you did.
A. I made a thorough examination of the mill.
Q. Did you run the mill?
A. Helped run it; yes, sir.
Q. How long?
A. Five or six days.
Q. How much flour did you make a day?
A. Three barrels and a half an hour.
Q. Now, I will ask you how long you have run it consecutively—how many hours at one time.
A. Twelve hours a day.
Q. Without stopping?
A. No; we stopped occasionally.
Q. I will ask you whether you stopped frequently or not.
A. Yes, sir. I made an examination and was satisfied with it.

By Mr. BOYD: Now, I propose to ask him what examination he did make—how long he did run it.
By the COURT: I will exclude that.

By the COURT:

Q. You ran the mill for the purpose of testing it?
A. Yes, sir.
Q. The test was satisfactory?
A. Yes, sir.
Q. Did you ever run a mill yourself?
A. Yes, sir.
Q. When?
A. Mr. Misenheimer was there, and I ran it while he went to dinner. Between the times we were both together.
Q. Did you ever run it at any other time?
114 A. No; not by myself. We relieved one another to go to dinner.
Q. Now, I will ask you if at the time you wrote this instrument you showed it to Mr. Van Stone.
A. No, sir; I did not.
Q. Why didn't you show it to him?
A. Because I was in Cordell's Bank when I read it and gave it to Mr. Schupp.
Q. Now, I will ask you if Mr. Van Stone ever saw it until this day.
A. I could not say.
Q. Did you ever inform him you had made any such written acceptance?

By the COURT:

Q. Did you make any acceptance except that one?
A. The only acceptance was at the mill, when Mr. Van Stone gave

Mr. Schupp a letter of acceptance. I told him the mill done all right and I would rather he would go to Mr. Van Stone and ask him to accept his own mill; that I did not see he could do anything more to improve it; and they went off together, and in the course of an hour or such a matter he came back with the letter of acceptance and showed it to me, and I thought that was sufficient to let me out.

By Mr. BOYD: This instrument of writing that is shown by these parties, I am informed, my client never saw or heard of until it was introduced in evidence.

By the COURT:

Q. To whom did you give that?

A. I gave it to Mr. Schupp. Of course I did not give the letter of acceptance at the time the mill was accepted by Mr. Van Stone; I thought it was useless. I accepted the corn mill, and he also asked me to give a letter of acceptance for the mill.

By Mr. BOYD: We now desire to amend the answer in this
115 particular: to charge a collusion between Mr. Schupp and Mr. Sommerville in the production of that article and its concealment from this defendant.

By the COURT: Would the other side be taken by surprise?

COUNSEL FOR PL'FF: Of course we would.

By the COURT: You will have leave to amend, but we will go on with the case.

Q. I want to ask you now if you ever told Van Stone at the time, October 16, that you accepted the mill.

A. I told him a day or two after, I believe, I accepted the corn mill.

Q. When did you tell him, and where?

A. At the mill.

Q. Who was present when you told him?

A. I don't recollect of any one.

Q. When was it you signed that written instrument?

A. On the 16th, I believe.

Q. Where were you when you signed it?

A. At Cordell's Bank.

Q. What time of day did you test the mill on that day?

A. In the evening.

Q. Did you write that before or after you tested it?

A. After, of course.

Q. What time in the evening did you write it?

A. The next morning, I believe, I wrote it.

Q. Who was present when you wrote it?

A. I was in Mr. Cordell's bank. Mr. Schupp was there.

Q. Was anybody else there that you know?

A. Not particularly.

Q. Did anybody else know*ing* what you was doing there at the time?

A. I don't know whether they did or not.

116 Q. Did Van Stone know what you was doing?
A. I suppose not.
Q. Did Van Stone ever know you had written that contract from any information of yours?
A. I told him I gave a letter of acceptance on the corn rolls.
Q. When did you tell him that?
A. A couple of days after.
Q. Was anybody present when you told him that?
A. I could not say.
Q. Where did you get the paper upon which you wrote that?

Counsel for plaintiff objects; which objection was by the court sustained.

Q. I will ask you where you are living now.
A. In Galloway county, Missouri.
Q. In whose employ are you?
A. Mr. Swan & Buckner.
Q. Where is Mr. Schupp working now?
A. Not any place particularly just now, I believe.
Q. Where was he working when you went to that place where you are now?
A. His brother was working at that mill and he was working at another.
Q. Who wrote you to go to that mill?
A. I wrote to Mr. Schupp if he knew of any opening to write to me, and he wrote me there was one there. I was out of a situation at the time.

Redirect examination:

Q. What quality of flour did this mill make?
A. First class.

Witness dismissed.

JOHN H. CORDELL, called as a witness on behalf of plaintiff, being duly sworn, testified as follows:

117 Q. Tell the jury where you live and what your business is.
A. I live in Marshall. I am in the banking business.
Q. You are a member of the firm of Cordell & Dunnica?
A. Yes, sir.
Q. Do you know Mr. Van Stone?
A. Yes, sir.
Q. And Mr. Frank Sommerville?
A. Yes, sir.
Q. And Fred. J. Schupp?
A. Yes, sir.
Q. I will ask you if you know Mr. Van Stone's signature. Did you ever see him write?
A. Yes, sir.
Q. I will ask you to look at that paper.
A. That looks like his signature.

Q. You can tell whether it is his signature or not?
A. Yes, sir.
Q. I will ask if you know about Mr. Van Stone and Mr. Schupp having a contract in reference to the mill.
A. Yes, sir.
Q. Do you know of them having any settlement in regard to it?
A. I know of payments being made. I don't know of any final settlement.
Q. I will ask you if you know of the acceptance of the mill or any part of it.
A. Yes, sir.
Q. Do you know who wrote that acceptance?
A. I think I wrote it out.
Q. See if you know the handwriting of that paper.

Witness here shown letter of acceptance by Van Stone, dated Aug. 6th, 1885.

A. Yes, sir; it is mine.
Q. Now, I will ask you if you heard any conversation between the parties at that time—Van Stone and Schupp.
A. Yes, sir; I did.
118 Q. Tell the jury what that conversation was.
A. Mr. Van Stone stated that the corn rolls were not satisfactory, but that the flour mill was entirely so, and that the mill was even better than he contracted for.
Q. I will ask you if you know on what account that acceptance was made; that written paper.
A. It was done at the request of Mr. Van Stone and Mr. Schupp upon Mr. Van Stone's statement that he would sign such a paper if it was written out.
Q. Why was it he wanted it then?
A. I don't know. I think the house wanted it for the purpose of settlement.
A. You don't know whether Schupp wanted to raise money or not? What house are you talking about—Stillwell & Bierce?
A. Yes, sir.
Q. You knew all the time that the machinery came from Stillwell & Bierce?
A. Yes, sir.
Q. And this was made for their benefit?
A. I presume so.
Q. I will ask you to look at that.
A. I wrote this letter myself.
Q. See if you wrote that copy attached to it.
A. Yes, sir.

Witness here shown letters dated May 4, 1885, and March 14, 1885, both signed by Fred. J. Schupp.

Q. What did you do with those things after you wrote them?
A. I sent them to Stillwell & Bierce.

Q. Well, is this the paper you copied at the time? Whose handwriting is that in?

A. It is Mr. Boyd's handwriting; that is the paper I copied.

Q. Of which this is a copy here?

A. Yes, sir.

Q. At whose request did you send this copy to Stillwell & Bierce?

119 A. I have forgotten, now, whether on the part of these parties who signed it or Still- & Bierce.

Q. You have been the custodian of the papers and this contract?

A. They were put in my hands temporarily and then withdrawn.

Q. Both parties came there to your bank and did business there, and made settlements there in your bank?

A. Yes, sir.

Q. I will ask you to look at that letter and state at whose request——

A. The letter states it was at the request of C. H. Van Stone and Fred. J. Schupp.

Counsel for plaintiff here offers said letter in evidence.

Cordell & Dunnica, bankers.

May 6, rec'd.

MARSHALL, Mo., *May* 4, 1885.

Stillwell & Bierce M'f'g Co., Dayton.

GENTLEMEN: At request of C. H. Van Stone and F. J. Schupp I enclose herewith a copy of a paper left with me in March by them.

Respectfully, J. H. CORDELL.

Copy.

Cordell & Dunnica, bankers.

MARSHALL, Mo., *March* 14, 1885.

It is hereby agreed that all payments and settlements made of and under the contract enclosed herewith (made by and between C. H. Van Stone & Fred. J. Schupp and of date January 16, 1885) shall be made to and with J. H. Cordell by said C. H. Van Stone, and no alteration of said contract shall be made unless in writing

120 signed — the parties.

(Signed) FRED. J. SCHUPP.
C. H. VAN STONE.

Cross-examination by Mr. BOYD:

Q. For what purpose did Van Stone and Schupp come in your office on the 6th of August, the day you wrote that contract?

A. I think it was for the purpose of making that payment.

Q. Did they make a payment on that day?

A. Twelve hundred dollars; I think so; yes, sir.

Q. To whom was that payment made?

A. I think it was made to me under this contract.

Q. To whom did that money go—who got that twelve hundred dollars that day?

A. I don't recollect, now, whether it went——

Counsel for plaintiff objects to this question because it has been admitted that the twelve hundred dollars was paid, which objection was by the court overruled.

A. I could not answer, because Mr. Schupp was in the habit of borrowing money from us to use in this work, and these payments sometimes went to discharge those notes. It was all used in this transaction, some way or another.

And thereupon the witness was dismissed, and the court adjourned until next Monday morning.

On Monday morning, at ten o'clock, the further hearing of the case was proceeded with as follows, to wit:

FRANK SOMMERVILLE, recalled as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. MORROW:

Q. Mr. Summerville, you may state whether you showed that acceptance to any one.

A. Yes, sir; to Mr. Cordell.

Q. J. H. Cordell?

A. Yes, sir.

121 Q. The banker at Marshall, Missouri?

A. Yes, sir.

Q. The witness who was here the other day?

A. Yes, sir; right in the bank.

Cross-examination by Mr. BOYD:

Mr. BOYD: I wish to ask him now that which I asked him about the other day in regard to collusion—if he tested that mill and when and where he made this written statement.

By the COURT: So far as the defendant is concerned, he having accepted it, that is out of the question. You can ask him so far as the corn-rollers are concerned. The defendant having accepted a part, no question can now be raised on that, but the rest you can ask him about.

To which ruling of the court the defendant, by his counsel, then and there excepted and still excepts.

By the COURT: Just read to me in the pleadings where collusion is charged—that part of the answer which charges collusion.

Counsel here reads pleadings to the court.

By the COURT: You can ask him in regard to that.

Q. I will ask you, Mr. Sommerville, on the fifth day of October, when you went to test this mill——

By the COURT: You understand you make him your own witness now.

By Col. BOYD: Well, I will not ask him the question now.

It is admitted that the plaintiff complied with the mechanics' lien law in this case in filing the papers in the circuit clerk's office and in making the necessary affidavits in accordance with the laws of Mo. on that subject, and that the property sought to be affected by said lien was properly described in said papers.

122 Plaintiffs here rested their case.

By Col. BOYD: I desire to offer a demurrer to the evidence in this case and herewith file the same.

By the COURT: It will be overruled.

To which ruling of the court the defendant, by his counsel, then and there duly excepted and still excepts.

Defendant's Evidence.

C. H. VAN STONE, being duly sworn in his own behalf, testified as follows:

Direct examination by Mr. BOYD:

Q. I will ask you if you are the defendant in this case.

A. Yes, sir; I am.

Q. You entered into the written contract that has been read in evidence with Mr. Schupp to build a mill at Marshall, Missouri?

A. Yes, sir; I did.

Q. I will ask you to state, Mr. Van Stone, what took place between Mr. Schupp and yourself in regard to the acceptance of that mill or any part of it about the first of August, 1885.

Objected to by counsel for plaintiff as incompetent, irrelevant, and immaterial.

By the COURT: I will overrule the objection.

To which ruling of the court plaintiffs, by their counsel, then and there duly except and yet except.

Q. Just state what took place between you and Mr. Schupp, Mr. Van Stone.

A. Well, we had been trying the mill for several days.

By the COURT:

Q. What part of the mill?

A. The flour mill.

By the COURT: I will exclude that evidence, all the evi-
123 dence on that branch. I will exclude that part of the testimony.

To which ruling of the court defendant, by his counsel, then and there excepted and still excepts.

Q. Now, Mr. Van Stone, I will ask you if Mr. Schupp ever furnished the corn-meal rollers under that contract.

A. No, sir; he never did.

Q. I will ask you to state if Mr. Sommerville ever came there to make a test of the rollers inside for the grinding of corn; and, if so, state what he said and what he did at that time.

A. Well, he came there to test them, and they worked about an hour and a half or two hours adjusting the belts and getting them ready. Then they came back after dinner and run them, perhaps, an hour or so, and the belts came off several times during the time they did run it.

Q. Did they express themselves at the time—Sommerville and Schupp—as to whether the mill was a good one as a corn-meal mill?

Objected to by counsel for plaintiff as incompetent, irrelevant, and immaterial.

Q. Just state what they said about it and what you said to them.

Objected to by counsel for plaintiffs for the reason here is the acceptance in court.

By the COURT: Here is the mill and the judgment of Sommerville. You may go on.

To which ruling of the court counsel for plaintiffs excepted and yet excepts.

Q. Just state what was done, Mr. Van Stone; what was said between the parties—you and Mr. Schupp.

A. Well, there was not but little said. They tried the rolls for about an hour or an hour and a half, and the rolls would not work. They did not work.

124 Q. How did Mr. Sommerville express himself at that time in regard to it?

A. Well, I do not know that he expressed himself. He would not express himself. They worked there at them, but they would not work, and they did not work. I said, "Why don't they run longer—all day—as the contract calls for?"

By the COURT: Where does the contract call for any length of time?

By Mr. DAVIS: No, sir; it does not.

Q. I asked you the question if a mill could be tested—if it can be tested in an hour.

Objected to by counsel for plaintiff as incompetent, irrelevant, and immaterial.

Q. I want to know as a matter of fact, and I am asking you, Mr. Van Stone, if since that time you have had experience with roller mills.

A. Yes, sir; I have.

Q. I will ask you to state to the jury if you can test a roller mill in an hour.

A. No, sir; you cannot.

Q. Well, just state to the court and jury the reason; just state to the jury the reason.

A. Well, the reason is it is not time enough. A mill might run for an hour and still not run for twenty-four hours' time. Those gentlemen that tested this mill never run it for two hours at a time. They could not.

Q. Why is it a mill can be run an hour and not be run for twenty-four hours?

125 A. Well, take the corn burrs. He would run them out for an hour and they run along, but it is such a strain upon the belts that leads to the pulleys that they would not stay on, and it is impossible to run for more than an hour and keep the belts on and grind anything and have any resistance against it. To put the speed on high he could not run over an hour. They cannot run them twenty-four hours without stopping; they would slip right off. I have not used them for a year and a half; in fact I never did use them.

Q. Did Mr. Sommerville inform you at that time that the roller mill, that part of the roller mill inside for corn, was acceptable to him?

A. No, sir.

Q. Did he ever inform you of that fact?

A. The first information I had was Saturday of last week.

Q. Did you ever see this written instrument he gave Mr. Schupp?

A. No, sir; I never saw it or heard tell of it.

Q. You never saw it or heard of it?

A. No, sir. Mr. Sommervile knew the corn mill did not work, and had ordered the burrs in their place, and he knew they did not work.

Q. I will ask you whether or how those rollers—corn-meal rolls—in making meal—whether they made first-class character meal.

A. No, sir; I could not sell the meal in Marshall.

Q. You could not sell the meal in Marshall?

A. No, sir.

Q. Did you try?

A. Yes, sir.

Q. Did you try the roller meal after the date Mr. Schupp was there?

A. Yes, sir; we tried to grind the meal on them for two or three months. As long as the belts were tight they would grind and do tolerably well. But you could not run them with any satis-

126 faction, and Mr. Sommerville knows that they would not run, and so did Mr. Schupp.

Q. Now, Mr. Van Stone, I will ask you if you have been to any expense in consequence of that burr not running, the corn rolls not running.

Objected to by counsel for plaintiff as incompetent, irrelevant, and immaterial.

Which objection was by the court overruled; to which ruling of the court plaintiffs excepted and still except.

Q. Just state what expense you have been to.

A. Well, we have had to remodel the whole thing and buy corn burrs to take the place of the rolls. I bought corn burrs and put in the place of the rolls, and we use them now.

Q. You use them now?

A. Yes, sir; and have been ever since.

Q. How long after?

A. Well, I ordered the corn burrs shortly after that. Some time between November and the first of January. I got them put in the following spring.

Q. Of what value were those corn rolls for the purpose of grinding meal?

A. Well, I don't know that.

Q. Well, for the purpose mentioned in that contract of what value were they?

A. Well, Mr. Schupp was asked——

Q. Never mind that—what Mr. Schupp said. I am asking you the question.

A. Well, I do not know, sir.

Q. Well, did they comply with that contract?

A. No, sir.

Q. Did they make first-class meal?

Objected to by counsel for plaintiff as incompetent, irrele-
127 vant, and immaterial.

Q. What kind of meal did they make? I believe you have already answered——

Objected to — counsel for plaintiff as incompetent, irrelevant, and immaterial.

Q. I ask you if you could make good meal upon them.

A. No, sir; it cannot be made. You might make good meal by grinding very slow and having the belts tight; and to make good meal when you grind so slowly the corn would not feed as slowly as they could handle it; it would not feed. The corn rolls are entirely worthless for making meal for the market. If any man here——

By Mr. DAVIS: Wait; we object to his making that statement.

Q. Now, Mr. Van Stone, under your contract you are to make certain cash payments?

A. Yes, sir.

Q. I will ask you to state to the jury whether or not any of those payments were made or not.

A. Yes, sir; those payments were all made before the time specified in the contract. Most of them were before and all at the time.

Q. Had you paid him any more than the contract price at that time?

A. Yes, sir; some little. I do not know just now how much extra.

Q. What did your contract require you to pay out at that time?

A. I had paid eighteen hundred and fifty dollars ($1,850) more than my contract called for.

Q. Now, at the time of the institution of this suit—I am asking you if any part at the time you were required to by the contract remained due and *and* unpaid.

A. No, sir; it was not due for nearly twelve months.

128 Cross-examination by Mr. DAVIS:

Q. There was some notes to be executed, Mr. Van Stone, was there not?

A. Yes, sir.

Q. And you refused to execute them?

A. No, sir; I did execute them.

Q. You say you gave those notes according to the contract?

A. I said I gave those notes according to the contract, to the best of my belief.

Q. Where are those notes?

A. In those papers.

Q. The same papers you offered the other day?

A. Yes, sir.

Q. Mr. Van Stone, what is your business?

A. I am in the milling business.

Q. How long have you been in that business?

A. Well, a good many years. I have been in it quite a number of years.

Q. About how many?

A. I could not say.

Q. Well, about how long?

A. Well, some sixteen or eighteen years.

Q. Some sixteen or eighteen years?

A. Yes, sir; off and on; longer, perhaps.

Q. You owned the Johnson mill, at Marshall?

A. Yes, sir.

Q. You are an expert miller?

A. Well, I claim to be a good miller in my system, but was not at that time. I claimed to be a good roll miller. I have had some experience; more than most of men have in a lifetime.

Q. You signed this paper (showing witness a paper)?

A. Yes, sir; I signed that paper.

Q. You wrote that?

A. Yes, sir.

129 Q. That was when Mr. Misenhelder came to examine the mill?

A. Yes, sir; it was the same time.

Q. At the same time you wrote a paper in Mr. Cordell's bank?

A. No, sir.

Q. Well, you signed it?

A. Yes, sir.

Q. After Mr. Sommerville came there and tested these corn rolls?

A. He came there, I suppose, to test them.

Q. And you tried to hire him to come and work there?

A. No, sir. I told Mr. Schupp I would not have him if he would work for nothing.

Q. You say you told Mr. Schupp that?

A. Yes, sir.

Q. Did you not tell Mr. Sommerville that you wanted him to come and work for you after he examined these corn rolls?

A. No, sir; Mr. Sommerville had worked for me.

Q. Mr. Schupp put in some corn-meal rolls there?

A. Yes, sir.

Q. And they are the ones he came there to test?

A. Yes, sir.

Q. When you made this contract you agreed upon Mr. Sommerville that he should test the mill?

A. Yes, sir.

Q. You made no objection to the testing of the corn rolls?

A. No, sir; I did not object to him going to try them.

Q. You knew they were going there and you were present the day that they tested the rolls?

A. Yes, sir.

Q. And you saw the meal made?

A. Yes, sir.

Q. And you advertised that you were going to make better flour and meal than any one else?

A. Yes, sir; I did. I made a great deal reduction in meal. I supposed the meal would do it, and I had my advertisements out before the rolls were put in.

130 Q. You say, Mr. Van Stone, the mill might run an hour and not run twenty-four hours?

A. Yes, sir.

Q. Did you run it twenty-four hours?

A. No, sir; and there is no man a living that could do that.

Q. Could you not tighten the belts and still run it?

A. Yes, sir; you could keep tightening them and wear them out before twenty-four hours.

Q. Will not any belt get slackened in a new mill?

A. They will not. Not a new belt in. They were well stretched the first day.

Q. How did you stretch them?

A. Well, the resistance was so great that they would not stay on.

Q. How did you stretch them?

A. Well, the resistance was so great that they would not stay on.

Q. The difficulty in the way, Mr. Van Stone, was in the belts—they got slacked?

A. No, sir; the rolls were not all guttered out. They were not worth any more than old iron. I could not run them, and Mr. Sommerville and Mr. Schupp could not run them.

Q. What kind of meal did they make?

A. When the belts were tight and I run those rolls they made meal—tolerably good meal.

Q. When the belts were tight and you run those rolls they made good meal?

A. Well, yes; sometimes, if they ground slowly and you fed, the meal would be tolerably good, but when you come to make such meal as would fill the market there was too much corn went over in the bran with it.

Q. You knew where this machinery all came from.

131 A. Well, not all of it, but most of it.

Q. You knew the machinery all came from the Stilwell & Bierce Manufacturing Company, or most of it?

A. Yes, sir.

Q. That was the reason you signed this acceptance?

A. No, sir.

Q. Why did you give Mr. Misenhelder that acceptance?

Objected to by counsel for defendant as incompetent.

By Mr. DAVIS: I will withdraw the question.

Q. Now, Mr. Boyd has asked you if you had put any expense or been to any expense on account of these rolls.

A. Yes, sir.

Q. What expense have you been put to?

A. Well, I bought in a good deal of corn at a high price, and when the rolls were put in, why they did not work, and the season went on and the price of corn came down.

Q. That was what was the matter with the rolls—the price of the corn went down and you quit making meal?

A. No, sir; it was not.

Q. You bought corn at a high price and the corn was reduced in price, in value, and you quit making corn meal; was not that the matter with the rolls?

A. Yes; I quit making corn meal.

Q. That was the expense you were put to?

A. No, sir.

Q. It was not?

A. No, sir. Mr. Davis, I bought burrs to take the place of those rolls.

Q. Who did you buy them from?

A. Nordyke & Marmon Milling Company.

Q. Who put them in for you?

A. Mr. Faulk.

Q. Mr. Schupp did not put the burrs in — lieu of those burs?

A. No, sir; he did not. He put the little burrs in there.

132 Q. You bought that?

A. Yes, sir.

Q. You used that?

A. Yes, sir.

Q. State the first time.

A. When those rolls were put in and taken out and before the other rolls came I used those rolls as well as I could.

Q. Who did you get to run them—run the mill for you?

A. When?
Q. After Mr. Schupp built it.
A. Mr. Hossett.
Q. And Mr. Morgan run it?
A. Yes, sir.
Q. When did he begin to run it?
A. Well, he began to run it—he did not begin to run it while we run the corn rolls any more. We quit running the corn rolls before he came.
Q. Did Mr. Hossett try to run the corn rolls?
A. Yes, sir; he made all the meal we made until we got the burs.

Redirect examination by Mr. BOYD:

Q. Did you quit making the corn meal because the price of corn went down?
A. No, sir.
Q. Well, just tell the jury why you quit making corn meal.
A. Well, we did not quit entirely at no time. We were idle and did not run when we were remodeling the mill. We did not make either flour or meal. I think we were about six weeks in remodeling the mill after Schupp quit. I put in about four thousand dollars' worth of machinery, and it took about six weeks to get it in there.

By DAVIS:

Q. That was in order to beat the other?
A. No, sir.
Q. You say that was not in order to beat the other mill.
A. No, sir.
133 Q. You were a rival of the Johnson mill and you wanted to beat it, didn't you?
A. Yes, sir. Mr. Schupp said he would build me a mill that would beat it, and he did not. I was losing money every day on every bushel of wheat I ground, and the farmers all quit patronizing my mill because the flour was not good.

By Mr. BOYD:

Q. Mr. Van Stone, I will ask you if you ever tested the capacity of the flour part of that mill.

Objected to by counsel for plaintiff as incompetent, irrelevant, and immaterial; which objection was by the court sustained; to which ruling of the court defendant, by his counsel, then and there at the time duly excepted and still excepts.

Q. Now, I will ask you if you at any time tested the flouring part of that mill with reference to the character and quality of the flour that could be made upon it.

Objected to by counsel for plaintiff as incompetent, irrelevant, and immaterial.

By the COURT: I will sustain the objection.

To which ruling of the court defendant, by his counsel, then and there duly excepted and yet excepts.

Q. I will ask you if you ever tested that mill with reference to the quantity of flour the mill would make in proportion to the quantity of grain used.

Objected to by counsel for plaintiffs for reasons the question is incompetent, irrelevant, and immaterial.

By the COURT: I will exclude that testimony.

To which ruling of the court defendant, by his counsel, then and there duly excepted and yet excepted.

134 Q. What was the value of that mill per day, so far as the corn-meal rolls were concerned, if they had been in the order in which that contract calls for; what would have been its value?

By the COURT:

Q. What was the profits? Is that what you mean?
By Mr. BOYD: Yes, sir.
By Mr. DAVIS: We object to that evidence as incompetent.
By the COURT: I will overrule that objection.

To which ruling of the court plaintiffs, by their counsel, then and there duly excepted and yet except.

A. Well, I couldn't say positively about that.
By the COURT: Well, approximate.
A. Sir?
Q. Approximate it as near as you can.
A. Well, we ought to be able to grind——
Q. Well, how much in money? Just bring it down to dollars and cents.
A. Well, I could not say. We have to run the mill sometimes on a close market, and sometimes we have better markets. We ought to be able to grind one hundred and fifty bushels of corn a day—twelve bushels to the hour, which would be about one hundred and fifty bushels.

By the COURT:

Q. Well, how much profit is there on a bushel?
A. Well, we aim to make from ten to fifteen cents per bushel. Ten cents don't pay, but fifteen cents does. It depends upon the competition what the profits would be; it will produce that to run three or four hundred bushels of corn——

Objected to by counsel for plaintiff as incompetent, irrelevant, and immaterial in regard to all testimony about profits in the future and in regard to the loss.

By the COURT: Well, well, that, as far as it serves us for the pur-

pose of estimating the loss, is competent. As to the loss in
135 the future I will exclude that.

By Mr. DAVIS: Our objection is if he undertakes to get at the value of the corn he must fix the value of the corn at the time and not now.

By the COURT: I will sustain the objection.

To which ruling of the court defendant, by his counsel, then and there duly excepted and still excepts.

E. E. HOSSETT, called as the next witness on behalf of defendant, being first duly sworn, on his oath testified as follows:

Direct examination by Mr. BOYD:

Q. Where do you live, Mr. Hossett?
A. I lived at Marshall, Mo., in the year 1885.
Q. Where do you live now, Mr. Hossett?
A. I live at Silver Springs, Arkansas.
Q. At Silver Springs, Arkansas?
A. Yes, sir.
Q. What is your occupation?
A. I am a miller.
Q. How long have you been a miller—engaged as a miller—in that occupation?
A. Well, about eighteen or nineteen years.
Q. You have been a miller about eighteen or nineteen years?
A. Yes.
Q. Where were you living in the month of October, 1885?
A. I was living at Marshall, Mo.
Q. You were living at Marshall, Mo.?
A. Yes, sir.
Q. In whose employ were you in the month of October, 1885?
A. I was in the employ of Mr. Van Stone.
Q. Mr. C. H. Van Stone?
A. Yes, sir.
Q. What time did you go into his employ?
A. I went there about the first of September.
136 Q. Mr. Hossett, I will ask you if at that time you had ever had any experience with roller mills.
A. Yes, sir; I had.
Q. Where had you been employed previous to the time you went to work for Mr. Van Stone?
A. Yes, sir; I was employed with W. M. Johnson & Company, at Marshall, Missouri.
Q. What kind had they?
A. The roller mill.
Q. How long had you been employed by Mr. W. M. Johnson and Company in that mill?
A. Well, I was there about three years in the roller mill.
Q. Do you know the mill in controversy in this suit?
A. What is that?

Q. Do you know this mill in controversy here in this suit?
A. Yes, sir; I do.
Q. Now, I will ask you when you went to Mr. Van Stone's—you say you went there in September—if you went to work in this mill.
A. Yes, sir.
By the COURT: In September?
A. Yes, sir; September, 1885.

By Mr. BOYD:

Q. I will ask you now if you operated the flouring part of that mill of Mr. Van Stone's when you went there; and, if so, to state in what condition it was and how it operated.

Objected to by counsel for plaintiff as incompeeent, irrelevant and immaterial.

The court sustained said objection; to which ruling of the court defendant, by his counsel, then and there duly excepted and yet, excepts.

Q. I will ask you, Mr. Hossett, if at the time you went to that mill, in September, 1885, the mill was in a condition to run—the flouring part of the mill would run at all.

137 Objected to by counsel for plaintiff for the reasons the question is incompetent and irrelevant and immaterial.

The objection was by the court sustained; to which ruling of the court defendant, by his counsel, then and there duly excepted and still excepts.

Q. Now, Mr. Hossett, I will ask you if you ever tested the capacity of that mill—the flouring mill; and, if so, state what quantity of flour it would make in twenty-four hours.

Objected to by counsel for plaintiff as incompetent, irrelevant, and immaterial.

The objection was by the court sustained; to which ruling of the court defendant, by his counsel, then and there excepted and still excepts.

Q. Now, I will ask you, Mr. Hossett, if you ever tested that mill with reference to the quality of flour it would make?

Objected to by counsel for plaintiff for the same reasons.

The objection was by the court sustained; to which ruling of the court defendant, by his counsel, then and there duly excepted and still excepts.

Q. I will ask you, Mr. Hossett, if you ever tested that mill with reference to the quantity of flour it would make—produce in proportion to the quantity of wheat used?

Objected to by counsel for plaintiffs as incompetent, irrelevant, and immaterial.

Objection was by the court sustained; to which ruling of the court defendant, by his counsel, then and there duly excepted and still excepts.

Q. Were you there at the time that Sommerville came there the eighteenth of October, or perhaps the 15th or 16th of October, 1885?

A. Yes, sir; I was.

138 Q. Just state to the jury how long F. Sommerville run the corn rolls attached to that mill at that time.

A. I think it was an hour and a half or two hours. I could not state exactly the time it was.

Q. Did they run steadily for an hour?

A. No, sir.

Q. I will ask you to state to the jury if they could be run steadily for an hour?

A. Well, they could if they put light feed on it, if they would grind slowly.

Q. Do you know what speed that mill was intended to run at?

A. What speed?

Q. Yes, sir; would it require of the mill to run it?

A. The corn rolls?

Q. Yes, sir; the corn rolls.

A. So as to grind three or four hundred bushels of corn per day?

Q. I did not ask the question in that shape. Did they run for an hour without stopping?

A. I think not. I say the belts came off.

Q. What was the difficulty about that?

A. Well, because they had on some feed and in working so fast the belts would not stay on. The belt was so tight they would not stay on there any length of time.

Q. Well, why?

A. Well, because the belt was too tight and they could not stay there any length of time. It was beyond the capacity of the belt.

Q. Why was that?

A. Well, if you would put the belt so tight the pulleys would give or break. It is bound to stretch and it could not stay on there.

139 Q. Was there any necessity of having the belts so tight?

A. Yes, sir; you would have to have the belts so tight that it would be impossible for the belt to stand the tightness to grind the amount of corn—ten or twelve bushels.

Q. Was that the case in all the mill?

A. No, sir.

By the COURT:

Q. What was there about it that would require to be so particularly tight?

A. Well, it would not require the belts to be so tight if they would grind what it would handle, say six or seven bushels per hour. The belt then would not come off, but if you put on more feed the belts would not stay on.

By the COURT:

Q. It was overfeeding them?

A. Yes, sir.

By Mr. Boyd:

Q. I will ask you, Mr. Hossett, if those corn rolls gave satisfaction at the time Mr. Sommerville tested them?

A. They did not. I know they did not.

Q. Did you hear Mr. Sommerville say anything about whether they satisfied him?

A. I did not hear him say.

Q. Was Mr. Schupp there?

A. Yes, sir.

Q. Did you hear Mr. Schupp say anything about it?

A. No, sir; he did not say anything about it. I did not stay there steady. I was going up and down stairs doing my business.

Q. I will ask you, Mr. Hossett, if that corn—if those corn rolls could have been run steadily for twenty-four hours at that time?

A. I say they can be run steadily if they would run what they can do with ease. If you put on that amount of feed they will run, but if you put on more they will not run that long.

Q. I want to ask you a question. I want you to state whether or not the amount these rolls would make would be sufficient to compensate a man for his work?

140 A. No, sir; it would not compensate him.

Q. You could make any money with the rolls?

A. You could not make any money with the rolls for the amount of work they would do. One instance, we could not make anything. Another instance, it would take one man to attend to them. It would take one man to start the rolls and other machinery. We would have to handle the rolls.

Q. Well, as to the character of the meal made by that machinery? What was the character of the meal made?

Objected to by counsel for plaintiff for the reason the question is incompetent, irrelevant, and immaterial.

Objection was by the court overruled; to which ruling of the court plaintiffs, by their counsl, then and there duly excepted and still except.

A. It was a common article.

Q. What do you mean by a common article?

A. Well, meal prepared——

Q. Are there grades in meal?

A. Yes, sir; there are. Some grades of meal—for instance, there is the roller meal, which is meal by rollers, and the stone meal. The roller meal is worth more money, but those rolls did not make the meal that common stones did—the stone meal.

Q. Well, they would not make as good meal as the common stone mill?

A. Well, yes; if you would grind slowly.

Q. How long did you remain with Mr. Van Stone in that mill?

A. Well, somewhere about the middle of November.

Q. About the middle of November?

A. Let's see. It was about the seventh of November—no, about the 10th or fifteenth.

Q. Did you know Fred. Schupp?

A. Yes, sir.

Q. Did you have any conversation with Mr. Fred. Schupp
141 with reference to the corn-meal part of that mill?

Objected to by counsel for plaintiff as incompetent, irrelevant, and immaterial, and is an impeaching question and counsel for defendant must lay the proper foundation first.

By the COURT: If that is an impeaching question—if the object is to impeach—you must give the witness the particular time and place.

By Mr. BOYD: I understand that to be the rule as far as ordinary witnesses are concerned, but in this case, while we have made no objection, the statute requires this particular party should be a party to these proceedings, and, he having been assignee of the account prior to its assignment, the plaintiff is bound by anything he said or did in the case.

By the COURT: That don't change the rule when you want to impeach a witness of any kind.

By Mr. BOYD: I wish to offer it as an admission.

By the COURT: Well, he may answer the question.

To which ruling of the court plaintiffs, by their counsel, then and there duly excepted and still except.

Q. State whether you had any conversation with Fred. Schupp.

By the COURT:

Q. What is the date of the assignment?

By Mr. BOYD: This is December the 21st.

By the COURT:

Q. What year?

By Mr. BOYD:

A. 1885.

By the COURT:

Q. What and when was that conversation you asked about, Mr. Boyd?

A. The conversation between the fifteenth day of October and the time he left the mill. He said he left the mill in November.

By the COURT:

Q. That was before the assignment?

By Mr. BOYD:

A. Yes, sir.

142 By Mr. BOYD:

Q. I will ask you if any time you had a conversation with Mr. Fred. Schupp with reference to the corn-meal rolls in that mill?

By the COURT:

Q. First or second set?

By Mr. BOYD: Second set that I am asking about.

A. I had some conversation with him about changing the cloth in the corn-meal belt. We were trying to make meal somewhat better——

Q. Well, what did he say about it?

A. Well, I do not know just what was said about it.

Q. Well, what did he say generally about the corn-meal rolls?

By the COURT: Say what he did say, not generally.

A. Well, we were talking about meal, what would make the meal any better and what we could do with the meal——

Q. What did he say about that?

A. Well, I do not remember what he did say.

Q. Did you have any other conversation with him in regard to the corn meal rolls?

A. No, sir.

Q. Did he ever say anything to you about them?

A. He might have said it makes good enough meal—I think good enough, or something like that. I think he claimed the rolls were good enough. I think that was about the way he expressed it.

Q. I am asking you if he made any statements to you during the month of September or October or November, while you were in that mill, with reference to the flour part?

Objected to by counsel for plaintiff as incompetent, irrelevant, and immaterial.

A. No, sir.

Q. Did he make any statement to you in regard to the capacity of the rolls? I am asking you if, in the month of September and while you were in that mill, you tested the mill with reference to its capacity as to the quantity of flour it would make in twenty-four hours?

143

Objected to by counsel for plaintiff as incompetent, irrelevant, and immaterial. Objection was sustained by the court; to which ruling of the court defendant, by his counsel, then and there duly excepted and still excepts.

Q. What is the value of those corn-meal rolls for the purpose of grinding corn and making meal?

A. I do not know; *that* have not got any value for grinding meal.

Q. You cannot make it pay to grind meal on those rolls?

A. No, sir.

By the COURT:

Q. It can be done by roller?

A. Yes, sir. It can be done by roller mills, but the expense to rolling demands too much and it would not justify in this case.

By the COURT:

Q. But roller mills can be made so they will grind corn properly?
A. Yes, sir.

Cross-examination by Mr. MORROW:

Q. Mr. Hossett, I will ask you — tell the jury whether or not the difficulty in running those rolls was not from the fact of overfeeding?
A. Yes, sir.
Q. That was where it come from; it did not come from the simple operation of the mill?
A. No, sir; it was in the fault of the rolls, because they were too small.
Q. What was the size of the rolls?
A. It is in case the rolls are overfed.

By the COURT:

Q. You mean to say they should be larger to make them competent for business, that is what I understand?
A. Yes, sir; it is not the fault of the rolls, but the fault is in the size of the rolls.

144 By Mr. MORROW:

Q. For the purpose of realizing a profit?
A. Yes, sir.
Q. Was not the difficulty in trying to operate these rolls from the fact there was overfeeding?
A. Yes, sir.
Q. That was the difficulty?
A. Yes, sir.
Q. And in that event it comes in the operation of the mill with these kind of rolls and it is simply a question of profits in operating it—this part of it?
A. I do not understand your question.
Q. Well, suppose we have a mill set up with the sized rolls we have had at that time, and the belt connections made and proper speed and properly fed, is there any reason why it should not run all right if you did not overfeed it?
A. Well, if you did not overfeed it, then the feed was so small the feed will not feed itself.
Q. Well, is there any reason why a mill of that kind, put up the way this was and not overfed, should not run smoothly and properly?
A. Yes, sir; if it was fed properly it would not feed regularly.
Q. Well, I do not mean the amount of meal made, but could not that mill run properly and smoothly if you take a set of rolls of the kind you had at that time and make proper belt connections, and adjusting the nature of the feeding, the matter of feeding properly, is there any reason for the inefficiency of these rolls as they were

put in this mill — should not run properly and smoothly aside from the amount or anything else?

A. Well, so far as the rolls are concerned, they did not run smoothly.

Q. Will you state the reasons for overfeeding?

A. Yes, sir; the belts came off.

Q. The belts came off?

A. Yes, sir.

145 Q. Well, eliminate the element of overfeeding, was there any other reason the corn-meal rolls did not run properly?

A. Yes, sir.

Q. What was it?

A. They were too small.

Q. Did not that come in the element of overfeeding?

A. No, sir.

Q. Was there any reason why the small rolls should not run properly if properly adjusted?

A. Yes, sir; you see the feed——

Q. Well, eliminate that question of feed.

By the COURT: Let me see. Do you mean to say it takes a certain quantity of feed in order to feed itself?

A. Yes, sir.

Q. But when you get to that point it feeds itself?

A. Yes, sir.

Q. But then when small it don't feed itself?

A. No, sir.

Q. Then when it is properly adjusted it feeds itself?

A. Yes, sir.

Q. When proportioned all right?

A. Yes, sir.

By Mr. MORROW:

Q. You say you have been engaged in the milling business and are a miller and have been for a number of years.

A. Yes, sir.

Q. You are a millwright?

A. I have done a good deal of that work.

Q. There is a difference between a miller and a millwright?

A. Yes, sir.

Q. I will get you to state briefly, as a matter of form, what that difference is.

A. Well, a millwright simply has the plans to go by and does the work right in putting the machinery into the mill; while the miller, his part is to operate the mill and run the machinery.

Q. So, in brief, a millwright constructs the mill and the miller operates it?

A. Yes, sir.

146 Q. Now, you say you have had some experience as a millwright?

A. Yes, sir; I have.

Q. Prior to this time of October, 1885?

A. Yes, sir.

Q. How much experience did you have prior to that time as a millwright?

A. Well, I have worked some as a millwright.

Q. When?

A. About ten or twelve years ago.

Q. About ten or twelve years ago?

A. Yes, sir.

Q. Was it a mill of this kind—roller mill?

A. No, sir; it was a stone mill.

Q. So then you never had any experience as a millwright in a roller mill of this kind at that time—in the month of October, 1885?

A. Yes, sir.

Q. Where?

—. In Johnson's mill.

Q. Well, as a millwright?

A. Well, I never worked as a millwright.

Q. So then the only experience you have had with roller mills of any kind commenced in October, 1885, as a miller?

A. Yes, sir.

Q. Are you able to tell the jury from your examination, if you made one, of the machinery relating to corn rolls, whether it was defective in its construction of the machinery? Can you tell this jury whether there was or not a defect in the construction of the corn-meal part of that mill? If there was just tell the jury what it was.

A. I do not know any other defect except the nature of the rolls; they were too small for the business they were calculated to do as rolls.

Q. Well, now, just explain to us how the corn gets to those rolls

147 By the COURT: Is that proper to go into that. He says he has had no experience as a millwright in roller mills, but as a miller he has had some; and if there was anything particularly wrong, he can tell that—if there was anything wrong in the production of the mill.

Q. You can tell *is* something was wrong in the product of the mill—what it produces—can you not, as a miller?

A. Yes, sir.

By the COURT:

Q. Although you do not know what particular it is defective in, but you can tell where it does?

A. Yes, sir.

Q. So a miller has some opinion about machinery, though he is not a millwright?

A. Yes, sir.

By JURYMAN:

Q. I want to ask you how much corn the corn rolls would grind in twenty-four hours?

A. How many bushels of corn these rolls would grind in twenty-four hours?

By the COURT:

Q. You can answer the question, if you know.

A. Well, I have run these rolls—I think they were put in about October, some time in October—and I think I have been able to, well, to run not all day, but I would grind from seven to eight bushels per hour.

Q. You could grind from seven to eight bushels per hour?

A. Yes, sir.

Q. What would an ordinary mill do; it would grind how many bushels?

A. Well, that depends upon the capacity of the mill; some as high as three or four hundred bushels.

Q. Well, the size of these rolls, what ought they to grind; supposing the size of these rolls, and they were properly adjusted and everything in condition, what would they grind?

148 A. Well, they would grind about seven or eight bushels per hour.

Q. They did grind that?

A. Yes, sir; I have done that with them.

By the COURT:

Q. They did it all right. Did you understand me—supposing these size rolls, every part of the machinery had been all right, how much ought they to have ground? How much ought they to have ground under the contract?

By Mr. MORROW: Not under the contract?

By the COURT:

Q. What would they grind, in your opinion?

A. Well, in my opinion, they ought to have ground——

By Mr. MORROW: How much?

A. Seven or eight bushels per hour.

Q. And they did grind that much?

A. Yes, sir.

Q. Then so far as the machinery and all the work was — perfect, but they were not large enough; that was the reason?

A. Yes, sir; by grinding a small amount; but they did not feed quick enough.

Q. What kind of corn were you feeding or using at that time?

A. We were using old corn.

By the COURT:

Q. That makes a difference, whether the corn is dry or damp?

A. Yes, sir.

Q. Was this dry or damp corn?

A. It was dry; yes, sir.

By the COURT:

Q. Where was it kept?
A. In the mill.
Q. How long had it been there in the mill?
A. Well, I do not know. It was there when I came to the mill.

By Mr. MORROW:

Q. Was it in the ear or the shuck?
A. In the ear.
Q. You do not know when it came there?
A. Well, some came while I was there and some was there
149 when I came there.
Q. It was shucked corn?
A. Yes, sir; we had to shell the corn and then ground it.
Q. Did you ever start a new mill before?
A. Yes, sir.
Q. You have started a new mill before?
A. Yes, sir.
Q. Did you ever start a roller mill before?
A. Not by myself.
Q. You saw one started before?
A. Yes, sir.
Q. I will get you to state whether or not a new mill, new roller mill, in starting like this, whether there is not always an adjustment that becomes necessary in the operation of the mill in the belts in regard to tightness and looseness? Is not that — necessary incident to starting a new mill of this kind?
A. No, sir.
Q. When you get a belt adjusted is there not a tendency in that belt to slacken, and then you have to take up a space of it?
A. Yes, sir.
Q. There is always a little jostle in starting a new mill?
A. Yes, sir.
Q. And this mill, the time you have been speaking of, the cornmeal rolls were new and just put in?
A. Well, I worked the corn mill for one month at least.
Q. Well, they were new rolls put in?
A. Yes, sir.
Q. And new belts?
A. Yes, sir.
Q. And new machinery?
A. Yes, sir.

Redirect examination by Mr. BOYD:

Q. Mr. Hossett, in the operation of this mill did it require any more force or attention to operative it than a mill that would operate properly?
A. Yes, sir.
Q. Well, just what additional force that mill required? Just state what more it required.

150 A. Well, it required more power to run in the corn.

Q. Well, would it require more people?

A. Yes, sir.

Q. Just state to the jury what additional force, so far as men were concerned, it would take to handle.

A. I could not state exactly the amount it would require. It would require more men to run the mill, because we had to stop it and wait; we could not raise enough steam.

By the COURT:

Q. You could not raise enough steam?

A. Yes, sir.

Q. Then the steam was at fault?

A. No, sir; it was because the rolls were too hard. There were too many pulleys to run.

By the COURT:

Q. Well, if there had been sufficient steam they would have run?

By Mr. BOYD:

Q. Suppose you had put on sufficient amount of steam to run the rolls, what would have become of the balance of the mill?

Objected to by counsel for plaintiff as incompetent, irrelevant, and immaterial.

A. Well, I mean those rolls would take more power than corn stones, and would take more power.

By the COURT:

Q. What would have been the case in putting on more power? What would have been the value per day of putting on more power?

A. Well, there would have been a loss.

Q. Well, how much loss?

A. Well, a dollar or two dollars or three dollars; there would have been a cost in the coal they used.

Q. There would have been extra cost in the fuel?

A. Yes, sir; I should think a dollar and a half or two dollars.

151 By Mr. BOYD:

Q. That would have been on account of that particular matter.

A. Yes, sir.

Q. Did it take any more hands to attend to the mill?

A. Yes, sir.

Q. It takes more attention, does it?

A. Yes, sir.

Q. Well, is that worth anything?

A. Yes, sir; a man's work is worth something.

Q. Well, how much addition for superintending that?

By the COURT:

Q. In dollars and cents?

A. How much?
Q. A dollar, or fifty cents, or twenty-five cents, how much?
A. Well, an extra hand is worth two dollars per day.

By the COURT:

Q. Would it require a whole hand?
A. Well, he could do some work besides.

By Mr. BOYD:

Q. Well, how much would it be worth in dollars and sents, say?
A. The extra attention it would be worth?
Q. How many cents?
A. Well, it would take about a dollar.
Q. I will ask you now if that hand could be dispensed with if the rolls had run all right?
A. Well, he ought to be.

By the COURT:

Q. That reduces the number?
A. Yes, sir; one hand would be necessary. His attention would be called there steady. He would have some other work.
Q. Mr. Hossett, supposing the corn-meal rolls in that mill had been so arranged as to have the capacity of three or four hundred bushels per day and make first-class meal, what would have been the rental value of a mill of that kind?

Objected to by counsel as incompetent, irrelevant, and immaterial.

By the COURT:

Q. That is another way at coming at the amount of damages, is it?
By Mr. BOYD: Yes, sir.

152 By the COURT:

Q. You can go and state if you know.

To which ruling of the court plaintiffs, by their counsel, then and there, at the time, duly excepted and still except.

Q. What would have been the value per day?
A. Well, I could not say as to that.
Q. What was a reasonable profit per bushel for grinding corn on a mill of that kind with a capacity of three or four hundred bushels per day?
A. Well, on rolls that would grind that, say, you make a profit of ten cents on the bushel.
Q. Make a profit of ten cents on the bushel?
A. Well, you would make a profit of ten cents per bushel.
Q. Well, running a mill that would only grind seven or eight bushels per day—I mean per hour—what would be the profits?
A. Something like eight cents per bushel.

Q. Would the profits be in the same proportion if it run ten? Would it pay more to run the mill where it made seven or eight?
A. It would not pay as well as if it ground more.

By the COURT:

Q. How about the expense?

Objected to by counsel as incompetent and immaterial.

By Mr. BOYD:

Q. Tell the jury whether out of the profits of that mill the operator gets for grinding corn he did not have to pay the running expenses of that mill.
A. Yes, sir.
Q. State to the jury what, on an average, the running expenses of the mill are per day—that is, running this mill of Mr. Van Stone's, which we have been speaking about.

Objected to by counsel for plaintiff as incompetent, irrelevant, and immaterial.

153 A. In regard to the corn-meal part of that mill—if they would run the flour part or corn part?
Q. Well, take the corn-meal part by itself. It cost something to run that, does it not?
A. Yes, sir.
Q. Well, how much does it cost to operate it—that is, per day?
A. Well, that depends upon the amount of fuel; and a man to attend to the mill, a man to deliver the meal—you would have to have——

By the COURT:

Q. What additional expense would there be—say the flour mill was running, what additional expense would it be to run the corn meal?
A. Well, it would require one man to watch the mill, to run the corn mill, and one man to deliver the corn, shell the corn, and deliver the meal after it was ground——

By the COURT:

Q. What would be the cost per bushel?
A. Well, five or six dollars per day.
Q. Five or six dollars per day?
A. Yes; except the fuel.
Q. About how much extra fuel—could you estimate how much extra fuel there would be in proportion they used for the double mill?
A. In this particular case, you mean?
Q. Yes, sir.
A. Well, it would be a third or a fourth.
Q. It would be somewhere near half?
A. Yes, sir.

By Mr. BOYD:

Q. I wish to ask him about a matter he has been interrogated about. I will ask you if it requires any more men about the engine to run the whole of this mill, flouring part and corn-meal part, than it would to run the flouring part?

A. No, sir.

154 Q. It would require no more about the engine?

A. No, sir.

Q. Now, would it require any more fuel to run the whole of that machinery, both the flouring part and the meal part, than to run the flour part?

A. Yes, sir.

Q. How much more?

A. Well, I told him — was a half in this particular case.

Q. Half as much more fuel?

A. Yes, sir.

Q. How many additional men would it require, and other expenses?

By the COURT: He has explained that before.

JESSIE MORGAN, called as next witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. BOYD:

Q. I will ask you, Mr. Morgan, where do you live?

A. I live at Marshall, Missouri.

Q. What is your occupation, Mr. Morgan?

A. I am a miller.

Q. How long have you been engaged in that business?

A. I have been engaged in that business about thirty years, sir.

Q. Where are you employed now, Mr. Morgan?

A. At Mr. Van Stone's mill.

Q. Is that the mill in controversy in this suit?

A. Yes, sir.

Q. How long have you been employed there?

A. I have been employed there about fourteen months, sir.

Q. You have been employed there about fourteen months?

A. Yes, sir.

Q. Were you there in November, 1885?

A. Yes, sir; I was.

Q. Were you there at the time Mr. Sommerville came there and run the corn-meal part of that mill?

A. Yes, sir.

155 Q. I will get you to state——

By the COURT: What did Sommerville do on that day?

A. Well, I do not know that I can say. He was testing the mill.

Q. What were you doing that day?

A. Well, I was helping around.

Q. Helping who?

A. Well, it was the miller.

Q. What miller?
A. One of Mr. Van Stone's millers.
Q. Well, about where Mr. Sommerville was operating this corn mill?
A. Yes, sir.
Q. Did you see what he did?
A. I saw him grind upon it, or trying to.
Q. How long did he try to?
A. You mean how many days?
Q. What length of time?
A. Days and months?
Q. Yes, sir.
A. Well, they did not run it any length of time—that is, through the day; they would stop very often.
Q. Well, how long did he run it on a test?
A. Well, I do not know that he run it an hour no time on a test.
Q. I will ask you if you know how long he run that mill continuously? What time was he running it without stopping it?
A. Well, sir, I could not tell. The corn-meal part you mean?
Q. Yes, sir.
A. Well, he did not run it no time over an hour.
Q. I will ask you to state.
—. ——.
Q. I will ask you to state to the jury, Mr. Morgan, how that mill operated at that—that part we have been talking about.

156 Objected to by counsel for plaintiff as incompetent, irrelevant, and immaterial; which objection was by the court overruled; to which ruling of the court plaintiffs, by their counsel, then and there duly excepted and still except.

A. Well, now, I do not know that I can answer that question.

By the COURT:

Q. Does he know anything about a roller mill?
By Mr. BOYD: Where have you been employed, sir?
Q. Have you been in that mill ever since that time?
A. No, sir; there was eleven months I was not there.
Q. Have you been employed in that mill, and have you had experience in operating that particular mill?
A. I have not in the corn mill.
Q. Did you ever undertake to run the corn mill?
A. No, sir; not myself.
Q. Did you ever see any one else try?
A. Mr. Sommerville tried to run it.

Objected to by counsel for plaintiffs as incompetent and immaterial.

Q. How long had you been engaged in the mill before that?
A. In the mill you say?
Q. Yes, sir.

A. Before that time you mean?
Q. Yes, sir.
A. Well, about twenty-eight years in mills.

By the COURT:

Q. Had you ever been employed in a roller mill?
A. No, sir; I had not.

By Mr. BOYD:

Q. I will ask you, from your experience, if you are qualified to tell what a roller mill ought to do.

Objected to by counsel for plaintiffs as incompetent, irrelevant, and immaterial. Objection sustained by the court; to which ruling of the court defendant, by his counsel, then and there duly excepted and still excepts.

157&158 Q. I will ask if you heard Mr. Sommerville say anything that day as to how the mill operated?
A. No, sir; I did not hear Mr. Sommerville.
Q. Was Mr. Schupp there?
A. Yes, sir.
Q. Did you hear him say anything about it?
A. I do not know whether it was the day he tested it or not. I could not tell you, but Mr. Schupp said in my presence these rolls were not any account.
Q. When was that?
A. Well, that was—I could not tell you the day; it was some time——

By the COURT:

Q. There were two tests, according to the testimony. The mill was tested twice; which time was it?
A. Well, the last one I was not there.
Q. You were not there the last one?
A. The corn-rolls mill—not when the test was made.
Q. Did you hear Mr. Schupp any time after the test was made—after the last test was made, October 15th and December 21st, 1885—say anything about those rolls—the last rolls?
A. Well, yes; it was some time about the first—along about the first of August.
Q. Well, never mind anything about the first of August. I mean any time between the fifteenth day of October and the 21st day of December in that time did you hear him say anything about these rollers—the last set of rollers put in the mill?
By the COURT: Between the fifteenth (15th) day of October and the first of December?
A. You mean 1885?
Q. Yes, sir.
A. No, sir; not between that time.
159 Q. You did not hear any statement from him at all?
By Mr. DAVIS: He says he did not.

Q. Did you ever try to operate these rollers at all?

By the COURT: *Q.* He has no acquaintance with roller mills. He says he is not familiar with that kind of machinery.

By Mr. BOYD:

Q. Do you know whether those rolls ever were operated in that mill afterwards?

By the COURT: You may state, if you know.

Q. These last set of corn rollers—were they ever operated and run after the fifteenth day of October?

A. They run until they got the burrs, I understand.

Q. Do you know whether they run until they got the burs?

A. I do not, sir.

By Mr. BOYD: I desire the record to show the same questions were asked this witness that have been asked before about the flour-mill part.

By the COURT: Just consider them asked and overruled.

To which ruling of the court defendant, by his counsel, then and there duly excepted and still excepts.

Cross-examination by Mr. DAVIS:

Q. You say you were there when Mr. Sommerville made a test?

A. Yes, sir.

Q. In what part of the mill and what were you engaged in at that time?

A. Not any particular business.

Q. Were you just running about the mill doing whatever you were called upon to do?

A. Yes, sir.

Q. You did not have charge of any particular part of the mill?

A. No, sir; I did not.

Q. Under whose directions were you?

A. Under Mr. Sommerville's, and some experts they had
160 there, every one of them.

Q. Well, who was over you?

A. Mr. Van Stone was over me.

Q. Was he about the mill that day?

A. Yes, sir.

Q. Did he use you the way he did ordinarily, sending you here and there to do whatever was to be done?

A. Well, he would send me to do whatever was to be done.

Q. How were you engaged? In your ordinary vocation in the mill on that day?

A. Well, anything that there might be to do in my business.

Q. Anything they called upon you to do or go for in any part of that mill you went and did it?

A. Yes, sir.

Q. And Mr. Sommerville was there testing those rolls?

A. Yes, sir.

Q. Can you tell the jury about how much of the day you put in

on the different parts of the mill while Mr. Sommerville was engaged there?

A. Well, I was keeping the belts on the corn rolls.

Q. Well, with Mr. Sommerville all the time—that he was testing these rolls.

A. No, sir; I was not.

Q. How much of the time were you with him?

A. Well, I could not tell you. I was frequently around where he was.

Q. You were called on frequently and called to other parts of the mill?

A. Yes, sir; sometimes down to the basement to put the belts on and sometimes above.

Q. And sent to other parts of the mill for other purposes?

A. Yes, sir.

Q. What occurred when you were away from Mr. Sommerville you do not know?

A. No, sir.

161 Redirect examination by Mr. Boyd:

Q. You say you were trying to keep the belts on?

A. Yes, sir; a great many times I was.

By the Court:

Q. Keeping the belts on?

A. Yes, sir.

Q. You mean putting them on. You did not keep them on, but you put them on?

A. Yes, sir; I put them on. They did not stay.

By Mr. Boyd:

Q. And that was while he was testing it?

A. I suppose he was testing it.

By the Court:

Q. The first or second?

A. The first.

Q. The second time you were not there at all?

A. No, sir.

By the Court: Well, that is not competent.

David Hinton, called as next witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Boyd:

Q. Where do you live, Mr. Hinton?

A. I live at Marshall, Saline county, Missouri.

Q. How long have you lived there?

A. I have been there about twenty years.

By the COURT:

Q. What is this witness' name?
A. David Hinton.
Q. Do you know Mr. Schupp?
A. Yes, sir.
Q. Do you know Charles Van Stone?
A. Yes, sir; I do.
Q. Do you know Frank Sommerville?
A. Yes, sir.
Q. Do you know the mill in controversy in this suit?
A. Yes, sir.
Q. Were you present in October, 1885, about the fifteenth day of October, when Sommerville and Schupp were at Mr. Van Stone's mill to make a test of the mill?
A. Yes, sir.
Q. Did you know anything about the mill at the time yourself?
162 A. No, sir; not very much.
Q. I will ask you if Mr. Schupp or Mr. Van Stone—I mean Mr. Schupp and Mr. Sommerville—at that day and at that time expressed themselves as to how the rolls—the corn rolls—in that mill operated.

Objected to by counsel for plaintiffs as incompetent, irrelevant, and immaterial.

By the COURT:

Q. What did they say?
A. Well, I do not recollect what I heard them say about the way they worked. I heard Mr. Van Stone—they claimed they made so much an hour, and he asked them to run the rolls on.
Q. Did they do it?
A. No, sir.
Q. Did you hear Mr. Sommerville say anything on that day about how the rolls operated?
A. No, sir; I did not.
Q. Did you on that day hear Mr. Schupp say anything about how they operated?
A. No, sir; I did not.
Q. Did you at any time after that and before the twenty-first (21st) day of December hear Mr. Schupp say anything about how that particular set of rolls operated?
A. Yes, sir.
Q. Just state to the jury what he said about how they operated.
A. Well, I was talking of putting——

Objected to by counsel for plaintiffs for the reasons he is asked about matter they did not ask Mr. Schupp.

By the COURT: If it is to effect the testimony of Mr. Schupp the foundation should be laid; but he may answer.

To which ruling of the court plaintiffs, by their attorneys, excepted and still except.

Q. Now, just state to the jury what you heard him say in regard to that set of rolls.

A. Well, sir, I was talking at that time of putting up a little
163 corn mill and feed mill, and asked him how those rolls would do. He said he would not recommend them no more; they did not give satisfaction.

Counsel objected to witness's stating anything that occurred in a private conversation between Schupp and the witness.

By Mr. MORROW:

Q. This was between Mr. Schupp and you, or was it between Mr. Van Stone and Mr. Schupp?

A. Between me and Mr. Schupp.

Q. Did he say anything further? Was that all the conversation about the rolls?

A. Well, he did not think the meal the rollers made would suit the market.

By a JURYMAN:

Q. Would your honor please ask him which ones it was? Was it the rolls that had been laid aside?

A. It was the last rolls in the mills.

Q. Have you ever had any experience as a miller?

A. Well, I have in grinding corn.

Q. Did you ever undertake to grind corn with a roller mill?

A. With a roller mill?

Q. Yes, sir.

A. No, sir.

Q. You did not?

A. No, sir; I only helped some there at Mr. Van Stone's; that is all the roller mills I have had experience.

Cross-examination by Mr. MORROW:

Q. Mr. Schupp, you say, told you he thought the meal would not suit the market?

A. Yes, sir.

Q. Now, up to that time there had been in vogue in that market meal made from corn-burr stones. From stones?

A. Yes, sir.

164 Q. That was the kind of meal sold there?

A. Yes, sir.

Q. There is a difference in the meal that is made by the burrs and this made by rolls?

A. Yes, sir.

By the COURT: Do you know that?

A. Yes, sir.

Q. And did not his remark that he made to you, that you say he made to you, have reference simply to the fact that in the trade

they would have to get the country used to the meal made by the rollers, and they were used to corn stone meal?

A. No, sir; it was not that.

Q. Was not that what he meant when he said he did not think the meal would suit the market?

By Mr. BOYD: I object to his stating the question that way to the jury.

Which objection was by the court overruled; to which ruling of the court defendant, by his counsel, then and there duly excepted and still excepts.

Q. Were you not talking about this very thing at that time, to wit, the difference between the two meals—the one made by the stone and the other made by the rollers?

A. No, sir.

Q. Had you not said a word about it?

A. I asked him how that meal would do.

Q. Well, what meal do you refer to?

A. The roller meal.

Q. The roller meal?

A. Yes, sir.

Q. What occasion had you to ask him why the roller-mill meal would not do if there was no difference?

A. Well, it seems they were not satisfactory.

Q. The roller-mill meal was not satisfactory?

A. Yes, sir.

Q. In the country?

A. Yes, sir.

Q. Of the general proportion of those you met?

A. Yes, sir.

Q. And for that reason you were asking him about the roller-mill meal?

165 A. Yes, sir.

Q. And it was in regard to that that he made this remark, that he did not think it would suit the market?

A. Yes, sir.

Q. That is the fact?

A. Yes, sir; that is so.

Q. He did not say it was bad meal?

A. Well, sir, I do not know whether it was or not.

Q. You do not know? He did not say it was bad meal that was produced by those rolls, this roller mill? He did not say it was on account of that, did he?

A. He said he would not recommend them.

Q. But all you did talk about was just as you have stated before—the meal produced by the roller mill was not suitable for that market? That was it?

A. I suppose so.

Q. Well, now, another question—the time you say you were present when the mill was tested?

A. Yes, sir.

Q. When Mr. Sommerville was there making a test of the corn rolls and when Mr. Schupp was there also?

A. Yes, sir.

Q. You say you heard talking about corn rolls?

A. I heard Mr. Van Stone ask them to run longer.

Q. You heard them talking about the rollers. Was that all you heard?

A. He asked them to run them longer. They were talking about the test, and he asked them to run longer.

Q. Well, this talk about the test that you claim to have heard was when they were making the test?

A. No, sir; it was afterwards.

Q. You say you heard Mr. Van Stone ask them to run longer?

A. Yes, sir.

166 Q. How much longer?

A. He did not say.

Q. Did he give any reason why he wanted them to run longer?

A. No, sir; he did not.

Redirect examination by Mr. BOYD:

Q. How long did they run these rolls at that time, if you know?

A. Well, I suppose they run them an hour or a little over, and then the belts would jump off every little bit. You could not run longer than an hour at a time. I know that myself.

Q. At the time Schupp was talking to you about the character of the meal made by these rolls what was the subject of your conversation with him at that time; what were you talking about; how did the conversation come up?

A. Well, he said the rolls would make more meal to the hour than the burrs.

Q. How did that conversation come up; what did you commence to talk to him about?

A. Well, I was talking at that time of putting up a roller mill.

Q. And you wanted him to put it up for you?

A. Yes, sir.

Q. Did he object at that time——

By Mr. DAVIS: We object to that as incompetent and immaterial.

Q. Was it his objection at that time to the roller mills generally or the particular kind of rollers in Mr. Van Stone's mill?

Objected to by counsel for plaintiffs as incompetent and irrelevant and immaterial.

By the COURT: Did he say anything about that?

A. Well, his objection was to the rollers; I do not know whether those in Mr. Van Stone's mill or not.

Defendant here rested his case.

Rebuttal Evidence.

FRED. SCHUPP, called as a witness on behalf of plaintiff, being
167 duly sworn, testified as follows:

Direct examination by Mr. MORROW:

Q. You were present when Mr. Sommerville made a test of the last pair of corn rolls put in there?

A. Yes, sir.

By Mr. BOYD: He has been examined as to that in his examination-in-chief, and I object to going into it now.

By the COURT: You can answer his question to contradict the other side.

To which ruling of the court defendant, by his counsel; then and there duly excepted and still excepts.

By Mr. MORROW:

Q. What kind of a test did he make; was it a fair test?

A. Yes, sir; a very fair test.

Q. What kind of meal did these rolls produce at that time?

A. Well, it made good fair meal; ordinary meal, as good as the burrs would make; not going any further than the roller system.

Q. Well, now, as to the capacity of the corn-meal rolls at that time?

A. Well, we did not run up quite to the capacity.

Q. State the amount.

A. We did not run quite to the capacity on account of getting the regulation of the feed, but we set the mill up and it run good continuously for considerable while. The first time we run it there was too much feed.

Q. Too much feed?

A. Yes, sir; too much corn. With the feed too heavy it run the belts off; then we stopped and put on the belts and then started with lighter feed and it had good feed for considerable time.

By the COURT: Going an hour?

168 A. Well, we had run considerable of the afternoon.

Q. Well, considerable time—what do you mean?

A. Well, a greater part of the afternoon.

By MORROW:

Q. A greater part of the afternoon?

A. Well, I suppose this time was about the middle of the afternoon.

Q. For what time had you been running?

A. Well, from one o'clock.

Q. From one o'clock to the middle of the afternoon?

A. Yes, sir; and I said to Mr. Sommerville, "I think she is running regular now;" and I spoke to Mr. Van Stone here and we cleaned out the corn-meal bin—took everything out. Then we timed the

mill for an hour. She run constantly for an hour, and we left it in running condition. It made thirteen and a half bushels of meal an hour. That is what we measured in the presence of Mr. Van Stone himself. He saw that we measured thirteen and a half bushels an hour.

Q. You knew Mr. Hossett that just testified here?

A. Yes, sir.

Q. Did you ever say to him that you would not recommend such rolls as were in Mr. Van Stone's mill?

A. Well, I had a conversation with him. He came to me with his uncle to make an estimate of the corn mill in Marshall.

Q. For himself?

A. Yes, sir; and his uncle and he wanted to know about corn roller and burrs for the country trade, the country being used to burr flour, and the roller flour requires a different managment in the kitchen to make it a success. With burr flour in the country, it is customary to make the meal up with water. It is the old Kentucky custom, and we use in roller-mill meal hot water or milk, and because the
169 roller meal would not make up with cold water that did not suit the market, and unless you go through with the entire system of the flour-meal part it requires separation and *and* aspiration the same as flour, and I told him unless he could go through with the entire system I would not recommend the roller.

Q. What he gave you to understand it was about the sale of the meal?

A. Yes, sir.

Q. And unless he could put in the entire system used for that reason you wouldn't recommend to him the system of rollers?

A. Yes, sir.

Q. Was there any other reason than what you have stated?

A. No, sir; there is no other reason.

Cross-examination by Mr. BOYD:

Q. Mr. Schupp, I will ask you how you became acquinted with the custom of the country down there—in the country about making meal?

A. Well, I was trying to introduce a new system of corn meal into the country, and I asked farmers, a great many of them, and I found that to be the unanimous objection to the meal—roller meal.

Q. You never were there and never saw a cook make bread.

A. Yes, sir. I took home some meal and my wife cooked the meal and it made a splendid success.

Q. Did you see any other cook down in that country make bread?

A. No, sir.

Q. Did you converse with any farmer that said he made bread that way?

A. No, sir.

Q. Did they tell you whether the bread was made with hot water or cold water?

A. Well, I heard—had it expressed to me before by more than a

half dozen—and I was told they were accustomed to the old Kentucky custom of baking old style corn bread—mixing the
170 dough with water—and we found by using hot water it made good bread, and I was told by a farmer. He said it was not generally known and used among the farmers.

Q. Who was it that told you that? Was he a cook?

A. I do not know.

Q. Was he a man that you knew made bread?

A. Well, I asked farmers coming there to Mr. Van Stone's mill.

Q. Did you ever ask any one that was in the kitchen?

A. I asked how they made bread; what kind of water they used. I heard that. They told me they used cold water to make the bread. Then there was a grocery firm in Marshall that told me that.

Q. What grocery?

A. Carpenter & Blair.

Q. They were not cooks, were they?

A. I suppose they had cooks.

B. F. Misenhelder, called as the next witness on behalf of plaintiffs, being first duly sworn, testified as follows:

Direct examination by Mr. Morrow:

Q. What is your occupation, Mr. Misenhelder?

A. I am a traveling salesman at present.

Q. What was your business—the business you have been brought up to?

A. I am a miller by trade.

Q. Have you had any experience also as a millwright?

A. No, sir; I never used tools.

Q. You are a miller?

A. Yes, sir.

Q. How much experience have you had as a miller?

A. Well, I have had about fifteen years, I think.

171 Q. Are you familiar with the roller-mill system?

A. Yes, sir.

Q. How long have you been so familiar?

A. About six years.

Q. About six years?

A. Yes, sir.

Q. Are you familiar with the rolls such as were put in this Van Stone mill in controversy? I think they are called seven by fourteen rolls?

A. Yes, sir.

Q. I mean the rollers last put in there—the last pair of rolls?

A. I never saw them.

Q. You never saw the particular rollers?

A. No, sir.

Q. Were you familiar with the six by eight rolls, such as are or were used there?

A. Yes, sir.

Q. I will get you to state to the jury, when the connections are

properly made, your feed proper, machinery properly connected with such rolls and operated, what is the capacity per hour for corn on such rolls?

Objected to by counsel for defendant as incompetent, irrelevant, and immaterial.

By the COURT: Can you tell the capacity of the rolls, six by eight, in that way?

A. Well, the capacity depends on how many you had, how many reductions are needed for the grain.

Q. Suppose three rolls, what would be the capacity?

A. Six by eight.

Q. And the corn was in proper condition?

A. Well, all the rolls running at proper speed, they should grind twenty-five bushels per hour.

Cross-examination by Mr. BOYD:

172 Q. And if they did not run twenty-five bushels per hour it was because they were not properly put up, Mr. Misenhelder?

A. No, sir; it might be the belts were too slack and would slip.

Q. Well, suppose they were not properly adjusted, then they would not make twenty-five bushels per hour?

A. No, sir; it would not be running right.

Q. Well, suppose the belts should be properly adjusted and they did not make twenty-five bushels upon a test or twenty bushels per hour, would that be owing to the character of the rolls?

A. Well, the rolls would do that work, and if they did not do it then it was because they would not be handled right.

Q. Well, might it not be because they were not put up right?

A. Well, they would not were that the case.

Q. You do not know how these rolls were put up?

A. No, sir.

Q. You never saw them in your life?

A. No, sir.

Plaintiffs here rested their case.

This was all the evidence offered by plaintiffs and defendant; whereupon the court instructed the jury as follows:

173 In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City. October Term, 1887.

STILLWELL & BIERCE MANUFACTURING CO.
vs.
C. H. VAN STONE.

Judge Krekel's Charge to the Jury.

GENTLEMEN OF THE JURY: It falls to the lot of jurors and the

court frequently for them to unravel what becomes a mystery when in court, but well known to the parties when they went into the transaction of their business. We have a case here in which a millwright contructed with an individual that wanted to build a mill, and they entered into a contract as to the manner of building it, the kind of material that should be used in it, and what should be the capacity of the mill, and the manner of payments; now these parties make that contract and are doing the work under it. It is their contract, and no one of them can vary *it* at any time any portion of the contract into which he has entered. The millwright, however, may waive any part that is favorable to the defendant in the case to the owner of the mill, or the owner, the individual who has the mill built, may waive at any time any portion of the contract that has been made that is favorable to him, but such waiver must be shown to your satisfaction. The written instrument upon which the suit is brought stands as self-evident of the contract that has been made. If it has been changed afterwards the party setting up the change must prove to your satisfaction the matter changed, and when done the contract between the parties to that extent becomes modified.

174 The defendant in this case has made a contract—a written contract. They have stipulated in the contract when the work was done a certain man should test the work and pass upon it as a judge of that kind of work, and then that contract stipulates whatever he says shall settle the matter of difference between them. Now it seems that at the time they undertook to separate two things—one part under which the flour mill was to — built, in which flour was to be made, and in the other corn meal. Now, if you are satisfied that they agreed that they would separate that, and that in consequence that this acceptance was given on the part of the defendant that he would accept that part of the mill, he had a perfect right to do so, and the writing he gave must stand to indicate the agreement unless you are satisfied from other testimony that that was not the intention. You, in looking at this testimony, will ask yourselves the question why he gave on the 16th day of August and up to the 15th day of October, while this acceptance of this flour mill had been given—why was there no complaint of the flour mill at that time because when they entered upon the question whether the corn mill was sufficient, when was the first instance of its being declared not sufficient by his writing himself? Why was he not making protests? What protests would have come regarding the other? That is for you to determine from the actions of the individual on this occasion when they were together in the mill. If anything had happened to any portion of the work, if anything had been done regarding any portion of the work, if it was not satisfactory, it is for you to determine from the evidence when and at what time a man acting in the ordinary circumstances what protests would have been made.

175 After they come to a lawsuit protests are to be found every place. We look for them in the whole business of the transaction by the parties, and in going over it is there where we

gather from the evidence what was the condition of things at the building of this mill. Now, it has been said that this contract, so far as the contract obtains, was for grinding corn; that it was not performed in a reasonable time; and you remember at the time for acceptance—from August 16th—the acceptance of part of the flouring mill and the acceptance of the other was October 15th. I mean not the acceptance, but the decision by the individual that had been selected to determine whether the mill was satisfactorily built or not. That was the 15th day of October, and you may look into the evidence and the actions of these parties and see whether under the circumstances there was a reasonable time to do it, and if you come to a conclusion that that was a reasonable time, and that it was satisfactory to the individual that had been appointed to determine the question whether the contract had been complied with or not, that settles that question. If you are satisfied from the testimony that was not a reasonable time, and that he did not complete that part of the mill in a reasonable time, then the question, even under the contract, arises, how much were the damages to the man received from that delay? and you must determine under the testimony that question. Now, in bringing a case of this kind the individual who has a contract may state his case in one or more counts. He has a right to say, I rely upon the contract itself, and claim that it has been fulfilled. The law allows an individual, when a case is here and it is found that he has not fully complied with the contract, to put in a second count and say, "Although I may not have complied with all the particulars of this contract,
176 but the man has my work and labor, and now I am entitled to pay for my material and labor." That is the usual way of stating a case in court, and that is for the purpose to meet the evidence that may be given, because, when an individual sues upon a contract, he cannot exactly tell what the testimony will be. He may be able to tell his own testimony, but will not be able to tell his opponent's, and, in order not to fail in his suit, a man may say in the very same petition, If I fail on the first count I will rely upon the second "for my work and labor, what it is reasonably worth." But this has a condition when he undertook to say that; that if he relies upon that part of his petition, then the question comes, "How much has the other man suffered from the non-compliance with that contract?" And that is for you to determine under the testimony. If you shall find that the contract has not been complied with, then you are to turn to the second count to examine what the work, labor, and materials are worth. Then you will enquire, under the testimony, how much has this individual been injured by the delay occasioned by it? And, in rendering your verdict on that count, you have a right to deduct that amount and reduce the consideration—that is, reduce the amount in your verdict. When you come to look at these pleadings, the first declaration—we call them declarations—when you file a pleading in the State court they have a way of filing it all in one count, but it is not the proper pleading according to the common law. It is a pleading authorized by the Legislatures of the States, and they have nearly all authorized that

kind of a pleading, and all that is required in the State court is to state the facts in a plain way and then make proof of them, and then the court declares the law upon them, and that is sufficient. That way of pleading does not prevail in the Federal courts, and had my attention been called to this matter at an earlier date, when these papers were filed and I had looked them over, I would have told the gentlemen, You must replead. Your pleading in that character cannot pass here. It will do in the State court, but not in our court. Here you have a marked difference in the first count of this petition which was filed in the State court. It declares upon the contract, and says, We are entitled to so much under our contract; and in that very same count, as we call it, they insert one for work, and say, We are entitled to $231.00 for extra work and labor that has been done. Now, the common-law pleadings require when you declare upon a contract you declare upon the contract and stop there; that is one count. If you have the claim in a proper condition you can sue also for work and labor done extra. You frame another count and say you have done so much, $231.00 for work, and specify what it is, and that is the second count; and that is the plea I have spoken of. They fall back upon the value of labor and materials. The third count the plaintiffs have made with the first count, and have in it that stipulation where it is claimed for extra services—that is, extra work and labor performed upon it. I told them to eliminate that, because the count would be good with that eliminated. I supposed they would draw a new petition, but instead of eliminating it out of the count by drawing a new petition, they go and stick in what they call a third count, and commence pleading as though they had commenced from the very start, and say a great many things that are not necessary. I did not see it until I picked it up at dinner and looked at it. It is not pleading. They have attempted, first, to declare upon the contract; next to declare upon what was the reasonable amount, value of work and materials, and the next count for doing extra work, and say, I claim so much on each. And this is not in a condition that way. The court may refuse to accept it at all, but I am not in the habit of turning a man out of court. I do not send a man away from court because he has not stated his case with that minuteness and form that a lawyer in the habit of practicing in the Federal courts —. When I have a case in court I never let it go until I settle the controversy between the parties, and when I find pleadings here not correct I direct them to be made so, until it raises the issue, and properly raises it, and then I ask a jury to help me determine the rights between the parties. But there is one difficulty about this lien—there is a real difficulty about that—something to be seen when you read that contract. One portion says, and my attention has been called to it because I examined the papers with care, and the gentlemen in discussing the question overlooked this. It goes on to say as to the manner of payment, and before I speak of the manner of payment, this speaks of another thing—that is this: They say, as a part of the defense, the pl'ff is not entitled to it; if he is entitled under the contract, he has re-

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ceived his money. They were to be paid in notes at two and three years after, and he sues for the money. Now, if they intended to rely upon that it was their duty to put that in their plea and make it a defense that the individual had no right to sue here, because he agreed to wait two and three years for the amount. Therefore he is not in court, and therefore they have failed to put that in their pleadings and have set it up here, and they say it is utterly at variance with the idea they ever intended to take payment on the contract and also have a lien. Now that argument must go by the board;
179 but in regard to this lien there is a particular difficulty, as you will see when I read the paper: "At the time of the delivery to the party of the first part he shall execute three promissory notes, each for the sum of two thousand dollars—one to run one year, one to mature in one year after date, one in two years after date, and the third three years after date, all bearing interest from date at the rate of seven per cent. per annum, interest payable annually. Said notes shall be well secured on real estate and of sufficient security." And they say here who shall determine that. They say the notes shall be well secured on real estate. There is nothing said about a lien upon that mill, required in the provisions of this contract. It says, Shall be well secured on real estate, and even goes so far and so cautious as to say who shall determine whether the notes are sufficiently secured. Now we have a difficulty. The notes have not been given; they have no security at all; under the law they have a right to secure themselves. Now, have they contracted themselves out of a right to file a lien so as to secure themselves? I say if you find the lien has been properly filed they have not, because I can determine that question afterwards, what shall be the security to be given in case you find for the plaintiffs.

Now, gentlemen, this is all I have to say. It is for you to go over the whole evidence and determine the case upon it. When parties get into court they raise all the objections they can. When you go back to an occasion when the parties were on good terms these things were done. Finally a difficulty arises and a great deal of
180 discussion is had, and it is for you to solve the difficulty under the evidence. If your verdict should be sustaining the contract it will be: We, the jury, find upon the first count in the petition—that is, the contract—and assess the damages at so much, which will be the amount of the contract, and six per cent. interest from date of filing this petition. The petition will be given you and you will see the date of filing in court. If you find for the plaintiff on the second count, your judgment there will be: We, the jury, find for plaintiffs and assess their damages at so much, with interest from date the petition was filed; and I have also called your attention to the fact in regard to the second count, if you find for the plaintiff, then you may take inte consideration the damages which resulted to the individual from failing to comply with this contract. Now, gentlemen, I am inclined, so far as this special bill is concerned, to say to you to find for the defendant for two reasons: First, I am inclined to think that it is embraced in the contract, and, in the second place, it strikes me that they could not expect to

recover two hundred and thirty-one dollars without making special proof of the items. They have not given you the items here, which they have not done; therefore, I say, find against plaintiff on that count and pass upon the first and second counts. This contract stipulates for seven per cent. interest, and you will calculate the same accordingly in case you find for plaintiff on the first count. If you find for plaintiff on the second count you will allow six per cent.

Take the case, gentlemen, and pass upon it.

181 To which charge and instructions of the court the defendant excepted at the time.

And afterwards, to wit, on the 10th day of November, 1887, and within three days after the verdict was returned, the defendant filed his motion for a new trial, which is as follows:

In the United States Circuit Court for Western Division of the Western District of Missouri.

STILWELL & BIERCE M'F'G CO., Incorporated, Pl'ff,
against
CHARLES H. VAN STONE, Def't.

Now comes the defendant and moves the court to set aside the verdict of the jury and the judgment rendered thereon in the above-entitled cause and grant a new trial of the same for the following reasons, to wit:

—. Because said verdict and judgment is against the law.

2nd. Because said verdict and judgment is against the evidence.

3rd. Because said verdict and judgment is against both the law and the evidence.

4th. Because the court erred in excluding legal and proper evidence offered by defendant.

Because the court erred as to matter of law in the charge and instructions as to the law given by the court to the jury.

Because the verdict of the jury exceeded in amount the highest sum that could have been awarded under the instructions of the court, and was in excess of the amount which could be recovered under the first count of plaintiff's petition, it being the same count upon which said verdict was found.

182 Because the verdict, upon the pleadings and evidence, should have been for defendant.

Because the court erred in declaring as a matter of law that plaintiff was entitled to a mechanic's lien and entitling a judgment enforcing the same.

Because the court erred in admitting illegal and improper evidence offered by plaintiff.

C. H. VAN STONE, *Def't*,
By BOYD & SEBREE, *Att'ys.*

And afterwards, on the 6th day of January, 1887, the court overruled said motion for a new trial, and to which action of the court in overruling said motion the defendant excepted at the time.

And on the 10th day of November, 1887, and within three days after said verdict was returned, the defendant filed his motion in arrest of judgment, which is as follows:

In the United States Circuit Court for the Western Division of the Western District of Missouri.

STILWELL & BIERCE M'F'G CO., Incorporated, Pl'ffs,
against
CHARLES H. VAN STONES, Def't.

Now comes the defendant and moves the court to arrest the judgment in this cause for the reasons—

1st. Because upon the record said judgment is erroneous.

2nd. Because the petition does not state facts sufficient to constitute a cause of action against defendant.

3rd. Because the first count of plaintiff's petition does not state facts sufficient to constitute a cause of action against defendant, if being the count on which the verdict was rendered.

4th. Because the verdict of the jury is not responsive to the issues made by the pleadings.

183 5th. Because plaintiff's petition on its face shows that this suit was instituted to recover a debt not due at its institution, and while the petition alleges a breach of contract by defendant it does not charge or show that plaintiff or his assignor was damaged by such breach, nor does it seek to recover damages for such breach.

CHARLES H. VAN STONE,
By BOYD & SEBREE, *Att'ys.*

And afterwards, on the 6th day of January, 1888, the court overruled said motion in arrest of judgment, and to which ruling of the court the defendant excepted at the time.

And now the defendant here tenders this bill of exceptions and prays that the same may be signed, sealed, filed, and made a part of the record in this cause.

Which is accordingly done this 6th day of February, 1888.

(Signed) A. KREKEL, *Judge.* [SEAL.]

The bond for writ of error filed February 6th, 1888, is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, *sct:*

Know all men by these presents that we, Charles H. Van Stone, Marion Sparks, and J. M. Sphar, are held and firmly bound unto The Stillwell & Bierce Manufacturing Company and its successors in the sum of ten thousand dollars; to the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of January, A. D. 1888.

Upon this express condition, to wit: Whereas the above-
184 named Charles H. Van Stone, defendant in the cause of The Stillwell & Bierce Manufacturing Company, plaintiff, *vs.* Charles H. Van Stone, defendant, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the cause above named by the circuit court of the United States for the western division of the western district of Missouri: Now, if the above-named Charles H. Van Stone shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

C. H. VAN STONE. [SEAL.]
MARION SPARKS. [SEAL.]
J. M. SPHAR. [SEAL.]

The above bond is hereby approved and ordered to be filed and made a part of the record.

A. KREKEL, *Judge.*

UNITED STATES OF AMERICA, } *ss:*
Western District of Missouri, }

Charles H. Van Stone, obligor in the within bond, being duly sworn, on his oath deposes and says that he resides as stated therein and is worth, over and above all debts and liabilities, the sum of twenty-five thousand dollars, and that he owns real estate to that amount, subject to execution, in the State of Missouri.

C. H. VAN STONE.

Subscribed and sworn to before me this 26th day of January, A. D. 1888.

My commission as notary public expires April 4, 1891.

[SEAL.] JOHN G. MILLER,
Notary Public.

185 UNITED STATES OF AMERICA, } *ss:*
Western District of Missouri, }

Marion Sparks, obligor in the within bond, being duly sworn, on his oath deposes and says that he resides as stated therein, and is worth, over and above all his debts and liabilities, at least the sum of ten thousand dollars, and that he owns real estate to that amount, subject to execution, in the State of Missouri.

MARION SPARKS.

Subscribed and sworn to before me this 26th day of January, A. D. 1888.

My commission as notary public expires April 4th, 1891.

[SEAL.] JOHN G. MILLER,
Notary Public.

UNITED STATES OF AMERICA, } *ss:*
Western District of Missouri, }

J. M. Sphar, obligor in the within bond, being duly sworn, upon his oath deposes and says that he resides as stated therein, and is

worth, over and above all his debts and liabilities, at least the sum of ten thousand dollars, and that he owns real estate to that amount, subject to execution, in the State of Missouri.

J. M. SPHAR.

Subscribed and sworn to before me this 26th day of January, A. D. 1888.

My commission as notary public expires April 4, 1891.

[SEAL.] JNO. G. MILLER,
Notary Public.

186 UNITED STATES OF AMERICA, *sct:*

I, Warren Watson, clerk of the circuit court of the United States for the western division of the western district of Missouri, do hereby certify that the foregoing is a true transcript of the record and proceedings in the cause therein named, as fully as the same appears in my office.

Witness my hand as clerk and the seal of said court. Done at office, in the city of Kansas, Missouri, this 9th day of June, A. D. 1888.

{ Seal of the United States Cir. Court, Western Division, for the Western District of Missouri. }

WARREN WATSON, *Clerk,*
By —— ——, *D. C.*

[Endorsed:] No. —. United States circuit court, western division of the western district of Missouri. Stillwell & Bierce M'f'g Co., plaintiff, against C. H. Van Stone, defendant. Certified transcript in the above-entitled cause. Fee, —.

Endorsed on cover: W. Missouri C. C. U. S. No. 452. C. H. Van Stone, plaintiff in error, *vs.* The Stillwell and Bierce Manufacturing Company. Filed September 22, 1888.

Office Supreme Court U. S.
FILED,
OCT 31 1891
JAMES H. McKENNEY,

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

CHARLES H. VANSTONE, Plaintiff in Error,

—vs.—

THE STILLWELL & BIERCE MANUFACTURING CO., Def'ts in Error.

Statement and Brief of Plaintiff in Error.

SAM'L BOYD,
ATTORNEY.

DEMOCRAT-NEWS PRINTING COMPANY, MARSHALL, MISSOURI.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1891.

CHARLES H. VANSTONE, Plaintiff in Error,

—vs.—

THE STILLWELL & BIERCE MANUFACTURING CO., Def'ts in Error.

This is an action begun by defendant in error against the plaintiff in error in the circuit court of Saline county, Mo., upon account and claim for mechanics' lien, assigned to defendants in error by one Fred J. Schupp, and removed to the U. S. court for the Western division of the Western District of Missouri. When upon trial judgment was rendered against plaintiff for $5,899.85, from which judgment a writ of error has been sued out, returnable to this court.

The amended petition contains 3 counts; the 1st of which is based upon a written contract between said Fred J. Schupp and plaintiff in error, charging a compliance with the terms of said contract by Schupp, except that he did not complete said work in the time required by the contract, as

to that part of the mill intended for grinding corn, and charging that plaintiff waived his right to demand a full compliance as to time by a ruling filed with the petition and marked "A," and a failure to comply on the part of plaintiff in error, and an assignment of all claims to defendant in error by said Schupp, and asking for the enforcement of a mechanic's lien on property described in the petition.

The 2nd count seeks to recover the value of work and labor performed and material furnished by said Schupp in building a mill for plaintiff in error, and claiming and asking the enforcement of a mechanic's lien on the mill property.

The 3rd count is for extra labor and extra material furnished by Schupp in building a mill under a contract with plaintiff in error.

The answer admits the contract mentioned in first count of the petition, and denies each and every other allegation of the petition, and specifically denies performance by Schupp and denies waiver as to time, and claims that by failure of said Schupp to perform his contract, was largely in excess of any benefit plaintiff derived from the material and labor furnished by said Schupp.

The reply was a general denial.

The facts as developed by the evidence in the case are that one Schupp and plaintiff, i e. Vanstone, entered into a written contract on 16th of January, 1885, whereby said Schupp was to build for plaintiff in error a flouring mill for the manufacture of flour, meal and breadstuffs; said mill to be erected in an elevator building belonging to said Vanstone, situated at Marshall, Missouri, on land described in the petition in this suit, on page 25 of printed transcript of record.

By the terms of the contract the said Schupp was to build a mill of a capacity of from 50 to 75 barrels of flour and 300 to 400 bushels of corn per day of twenty-four hours, the work of the mill as to the quality of flour and meal to be first-class, and the quantity of flour and meal produced by said mill, in proportion to the wheat and corn used, to be up to the standard of first-class mills.

The said Schupp to furnish all the material except what was there on the premises and do all the work and be at all the expense. A list of the material to be used was attached to the contract.

The said Schupp was to make all necessary connections between the engine and other machinery, and have said mill complete and ready for delivery before the first day of August, 1885, and not before July 1st, 1885.

When the mill was ready to be delivered upon its completion, the said Schupp was to notify Vanstone, and the mill was to be tested by one Frank Sommerville, who was to decide whether or not said mill was constructed and operated in accordance with the contract. If the said Sommerville decided that it was *not* built according to the agreement then Schupp was to have 15 days in which to correct any deficiency, and at the end of that time to again test it, and if still deficient should estimate and ascertain what amount

should be deducted from the contract price on account of such deficiency.

If said Sommerville in any event failed or refused to act, then the parties were to select some other competent person.

In consideration of the building of said mill Vanstone was to pay $8200 as follows: On April 1st, $500, on May 1st, $500, and when the mill was delivered $1200, and at the time of the delivery execute to the said Schupp 3 notes for $2000 each, to mature in 1, 2 and 3 years, bearing 7 per cent. interest from date, the interest payable annually, and the notes to be well secured on real estate.

This contract is shown in the printed transcript, at pages 47, 48 and 49, with list of materials to be furnished by Schupp.

Under this contract the said Schupp proceeded to build a mill, and on Aug. 6th, 1885, notified Vanstone that it was ready for delivery; but upon testing it the parties agreed that the corn rolls did not work properly, and the said Vanstone then signed and delivered to said Schupp the letter found at page 51 of printed record, as follows:

MARSHALL, MO., Aug. 6th, 1885.

F. J. SCHUPP, ESQ., MARSHALL: The flour mill put up by you for me is satisfactory to me and is hereby accepted. The corn rolls do not work to my satisfaction. When ever such rolls are put in as shall do satisfactory work I shall be ready to pay for the entire work.

(Signed) C. H. VANSTONE.

Vanstone paid on the mill contract the following:

Jan. 26th, 1885,	- -	$450.00.
May 7th, "	- -	550.00.
May 26th, "	- -	813.75.
Aug. 6th, "	- -	1200.00.
" " "	- -	30.00.
		$3043.75.

On the 10th of October the said Schupp claimed that he had completed his contract and had Sommerville come to the mill to test it. Sommerville did come, and on the 16th day of October, 1885, executed the following writing, dated,

MARSHALL, MO., Oct. 16th, 1885.

"MESSRS. SCHUPP AND C. H. VANSTONE: The corn rolls and adjustments to same, operated and tested by me on the 15th day of October, 1885, is entirely satisfactory to me, and I hereby accept it according to your contract."

(Signed), FRANK SOMMERVILLE.

He also executed the following:

"The flour mill, also, which was built by the above F. J. Schupp, for the above C. H. Vanstone, which was tested by me about August 6th, was also entirely satisfactory to me."

(Signed), FRANK SOMMERVILLE.

Both the above instruments will be found on page 54, of printed transcript.

During the time said Schupp was building the mill it was further agreed between them that all payments and settlements under the contract for building the mill should be made with J. H. Cordell (which agreement is shown at page 74, printed record), and the written instruments above set out were delivered by Sommerville to J. H. Cordell. Whether they were ever shown to Vanstone, or whether he

was in any way notified of Sommerville's action in that regard, is a disputed fact.

After the 16th of October, an effort seems to have been made by Vanstone and Schupp to settle, but a disagreement arose as to the amount for which Vanstone should execute notes, Schupp contending for $5392.53, which included $236 for extra work, and Vanstone contending for an amount less than contract price on account of failure to perform contract by Schupp—both as to manner and time of performance.

Schupp afterwards assigned all his claim under the contract to defendant in error.

This suit was instituted Jan. 20th, 1886.

Under the instructions of the court, the jury returned a verdict as follows:

"We, the jury, find the issues for the plaintiff in the first count in the sum of fifty-one hundred and fifty-five and 88-100 dollars ($5,155.88), with seven per cent. interest; amount of interest, $743.95; sum total, fifty-eight hundred and ninety-eight and 85-100 dollars.

I. C. GALES, Foreman Jury."

See page 44 of printed record.

The Court thereupon entered judgment for said amount and interest, and for special lien on mill property in default of executing note within ten days.

See judgment at page 45 of printed record

SAM'L BOYD,
Attorney for Plaintiff in Error.

ASSIGNMENT OF ERRORS.

The Court erred in admitting any evidence in the case.

The Court erred in submitting the cause to the jury, and entering up a judgment upon the verdict.

The Court erred in refusing to sustain the demurrer to the evidence offered by plaintiff in error.

The Court erred in overruling the motion for new trial asked by plaintiff in error.

The Court erred in overruling the motion in arrest of judgment, asked by plaintiff in error.

The Court erred in entering up judgment recognizing and enforcing a mechanic's lien.

The Court erred in construing Exhibit "A" (which is letter of Vanstone to Schupp, found at page 16 of printed record) to be a waiver of the time in which the mill was to be completed.

The Court erred in overruling the demurrer to the evidence.

POINTS AND AUTHORITIES.

I.

The first count in the petition was an action for the enforcement of a mechanic's lien, and unless the assignee of defendant in error was entitled to such lien no recovery ought to have been had under that count.

The Statutes of Missouri require suits for the enforcement of mechanic's liens to be instituted within nine months from the completion of the work.

See Rev. Stat. Mo., 1889, Sec. 2709 and 2720.

The money sought to be recovered in this case, as shown by the first count of the petition, was by the express terms of the contract not to become due in less than one year after the completion of the work, and was to be secured on unincumbered real estate. Such contract was an express waiver of the mechanic's lien.

Barrows vs. Baughman, 9 Mich., 217.
Weaver vs. Demuth, 40 N. J., 238.
Gorman vs. Sagner, 22 Mo., 137.
Bailey vs. Hull, 11th Wis., 289.
Schmidt vs. Gibson, 14 Wis., 560.

II.

Where the original contract between the owner and mechanic provides that notes shall be taken, which shall not become due within the time in which an action is to be brought to enforce a mechanic's lien, there is a waiver of

the lien, and a breach of the contract by the owner does not give the contractor any right to claim a lien.

Isenman vs. Fugate, 36 Mo. App., 166.
Penning vs. Skipper, 71 Md., 347.
Simon vs. Block, 16 Bradw. (Ills. App.), 450.
Beasley vs. Webster, 64 Ills., 458.
Willison vs. Douglass (Md.) 5 Cent., 575.

III.

The judgment in this case is erroneous—if not absolutely void—because it is a judgment for the enforcement of a mechanic's lien, and is not supported by the verdict of the jury, and no evidence was offered showing, or offering to show, a compliance with the mechanic's lien law of Missouri.

Williams vs. Porter, 51 Mo., 441.
Hall vs. Johnson, 57 Mo., 521.
Brooks vs. Blackwell, 76 Mo., 309.
See verdict, page 44, printed record.
See judgment, page 45, printed record.
See Judge's charge, page 115, printed record.

IV.

The refusal of plaintiff to give notes for a greater amount than was provided for by the contract, (after deducting payments) was not a breach of his contract.

The demand made as shown by witness Schupp, (original contractor), was for over $5300. The amount called for by contract, after deducting payments, was $5155.88, as shown by the contract and evidence.

The demurrer to the evidence should have been sus-

tained. Defendant in error was not entitled to any mechanic's lien.

There was no breach of contract on the part of plaintiff in error, shown by the evidence, and the demand sued for was not due, nor was any part of it.

See printed record, pages 66 and 67, Schupp's testimony.

V.

The writing signed by plaintiff in error, "Exhibit A," (see printed record, page 16,) dated August 6th, 1885, should be construed with relation to the original contract, and the extension of time, if any is given by it, has reference to the time—15 days—stated in and fixed by the contract.

See Bishop on Contracts, Sec. 372, 382, 406, (enlarged edition.)

And the failure to finish the mill within that time was a breach of the contract.

See Eyerman vs. Mt. Sinai Cemetery Co., 61st Mo., 489.

Yales vs. Ballentine, 86th Mo., 530.

Murphy vs. Taylor, 8th Mo., app. 483.

Bishop on Contracts (enlarged edition), sections 1344 and 1420.

ARGUMENT.

Under the contract in this case all cash payments provided for therein, and about $830 more, had been paid prior to the completion of the mill, and by the express terms of the contract the remainder of the contract price was to be paid by notes and deed of trust on real estate, the notes payable in one, two and three years after the completion of the mill. The contract itself shows that the intent of the parties was that there should *be no mechanic's lien.*

That class of cases in which the taking of a promissory note is declared not to be a waiver of the lien, are cases where, under the original contract, the contractor's right to a lien was *not excluded*, and where by his work the right to the lien had *accrued.* He *could* then *waive* it.

But under a contract, like the one in this case, where the existence or creation of the lien was by the terms of the contract prohibited or prevented, there could be no such thing as a waiver of lien. There could be none to waive or lose.

Even if by any breach of the contract by *the owner*, the contractor could have been entitled to a lien, he certainly could not become entitled to it by his own wrong.

In this case the contract was to have the mill completed by August 1st, then to have it tested, and if not up to contract the contractor to have fifteen days in which to complete it.

He did not complete it for nearly two months, and then demands to be paid more money than the contract price.